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In the
United States Court of Appeals
For the Seventh Circuit

No. 11798

P. & D. MANUFACTURING CO., INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of a Final Order and Order to Cease and Desist.

APPENDIX TO PETITIONER'S BRIEF

HAROLD T. HALFPENNY
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The Scheffer Press, Inc.—ANdover 3-6850

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1-2 * * *

3 UNITED STATES OF AMERICA
Before Federal Trade Commission

In the Matter of
P. & D. Manufacturing Co., Inc.,
a corporation.
} Docket No. 5913

COMPLAINT.

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent P. & D. Manufacturing Co., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with principal office and place of business located at 19-02 Steinway Street, Long Island City 5, New York.

Paragraph Two: Respondent is now, and since June 19, 1936, has been, engaged in the manufacture, sale and distribution of automotive products, mainly ignition replacement parts and supplies. Respondent sells and distributes its products to different purchasers, principally to jobbers located in various states of the United States and in the District of Columbia. Respondent causes said products when sold to be transported from its places of business to the purchasers thereof located in various

states other than the state of origin; and there is and has been a continuous current of trade and commerce in said products across state lines between the points of origin of shipments and the purchasers of said products. Respondent's products are sold and distributed for use, consumption and resale within the various states of
4 the United States and in the District of Columbia. Many of the purchasers of respondent's products and many of the purchasers of similar product from respondent's competitors are competively engaged the one with the other in the resale and re-distribution of said products.

Paragraph Three: In the course and conduct of its business as aforesaid, respondent is now, and during the time herein mentioned has been, in active and substantial competition with other corporations, partnerships, firms and individuals engaged in the manufacture, sale and distribution of similar or comparable automotive products, ignition replacement parts and supplies in interstate commerce for consumption, use and resale.

Paragraph Four: In the course and conduct of its business, as aforesaid, respondent is now, and since June 19, 1936, has been, discriminating in price between purchasers of its products of like grade and quality, by selling such products to some purchasers at higher prices than to others, competitively engaged in the resale thereof within the United States.

This price discrimination is, and has been, principally caused by the fact that respondent distributes its products through the medium of three separate contracts or agreements. These contracts provide the following rebate schedules:

1. Respondent enters into a "Distributors Rebate Agreement" contract with some of its purchasers, whereby respondent grants or allows such purchasers rebates

or discounts off its jobber list prices. These rebates or discounts are based upon the net monthly dollar value of purchases as shown by the following rebate schedules:

(a)	$100.00 to 149.00	5%
	150.00 to 199.00	7%
	200.00 to and up	10%
(b)	$200.00 to 299.00	10%
	300.00 to 399.00	13%
	400.00 to and up	15%

The "Distributors Rebate Agreement," containing schedule (b) as distinguished from schedule (a) above further provides for a rebate up to 10% on cabinet assortments and merchandisers, all of which is more fully shown by 5 copies of the rebate agreement attached hereto marked "A" and "B", and made a part hereof.

2. Respondent enters into a "Distributors Franchise Agreement" contract with some of its purchasers, whereby respondent grants or allows such purchasers rebates or discounts of 20% and 2% off its jobber list prices on all monthly purchases, subject to a limitation of 10% on cabinets and assortments. Said rebates and discounts are applicable to all purchases whether made by the purchaser for resale to jobbers or for resale to the customers of said jobbers and the total of all such purchases so made and resold is considered by the respondent in connection with any volume rebate made available or offered by the respondent to the purchasers under such agreement, all of which is more fully shown by copy of the franchise agreement attached hereto, marked "C", and made a part hereof.

3. Respondent enters into a "Distributors Franchise Agreement" contract with organizations composed of, or representing, purchasers whereby respondent grants or allows such organizations a rebate or discount of 20%

and 2% off of its jobber list prices on all monthly purchases made by its members, or by the group represented by such organization, subject to a limitation of 10% on cabinets and assortments. Said rebates and discounts are applicable to all purchases whether made by the purchaser for resale to jobbers or for resale to the customers of said jobbers and the total of all such purchases so made and resold is considered by the respondent in connection with any volume rebate made available or offered by the respondent to the purchasers under such agreement. For the purpose of computing any volume rebate on such purchases, respondent further considers the aggregate purchases of the organizational group as such, regardless of the net monthly dollar value of purchases made by each individual purchaser as in the case of a non-group purchaser.

Paragraph Five: In the sale and distribution of its products in commerce, as aforesaid, respondent is now, and since June 16, 1936, has been, further engaged in price discrimination by allowing or granting to some purchasers varying rebates or discounts, off of its jobber list prices, different from, other than, or in addition to, the rebates or discounts set forth in subparagraphs 1(a), 1(b), 2, and 3 of Paragraph Four hereof and not granting or allowing such rebates or discounts to other 6 purchasers, of its products of like grade and quality, who are competitively engaged in the resale of such products in the United States and in the District of Columbia with the purchasers receiving such rebates or discounts.

Paragraph Six: The effect of respondent's discriminations in price between different purchasers of its automotive products of like grade and quality, as set forth in Paragraphs Four and Five herein has been, or may be, substantially to lessen competition, or to injure, destroy or prevent competition in the manufacture, sale, and distribution of such automotive products; and the effect of said discrimination has been, or may be, to tend to create a monopoly in the lines of commerce in which respondent and in which its favored purchasers are engaged, or to injure, destroy or prevent competition with respondent, with the favored purchasers, or with customers of either of them.

Paragraph Seven: The aforesaid acts and practices of respondent constitute a violation of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 9th day of August, A.D., 1951, issues its complaint against said respondent.

NOTICE.

Notice is hereby given you, P. & D. Manufacturing Co., Inc., respondent herein, that the 15th day of October, A.D., 1951, at 10 A.M. o'clock, is hereby fixed as the time, and New York, New York, as the place when and where a hearing will be had before Webster Ballinger, a trial examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law as charged in this complaint.

You are notified and required, on or before the 20th day after the service upon you of this complaint, to file with the Commission an answer to said complaint. The Rules of Practice of the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

7 In case of desire to contest the proceeding the re-

spondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the grounds of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

• • •

Failure of the respondent to file answer within the time above provided, and failure to appear at the time and place fixed for hearing, shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint, and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure.

The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions under Rule XXI, and the right to appeal under Rule XXIII.

Rule V of the Rules of Practice provides in part:

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments,

offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public
8 interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 9th day of August, A.D., 1951.

By the Commission.

(Seal)

/s/ D. C. Daniel,
D. C. Daniel,
Secretary.

9 "A"

P. & D. MANUFACTURING CO., INC.
DISTRIBUTOR'S REBATE AGREEMENT

This Agreement entered into this .... day of .... between P. & D. Manufacturing Co., Inc., Long Island City, New York, known as the Manufacturer and

(Firm) ....

(City) .... (State) ....

known as the Distributor, wherein the Distributor hereby agrees to purchase his or their entire requirements of ignition repair parts as catalogued from the Manufacturer from the above date until ....

In Consideration of the above agreement, the Manufacturer agrees to allow the Distributor the following rebates instead of the usual 2% of the value of all invoices, Except on Cabinet Assortments and Merchandisers, Super Chief Magnetos and Super Chief Magneto parts.

Volume: The amount or rebate earned will be determined by the net purchases shown on your monthly statement.

On monthly purchases of:

	$100.00	$150.00	$200.00
	to 149.00	to 199.00	to and up
Discounts will be:	5%	7%	10%

Super Chief Magnetos and Super Chief Magneto parts are subject only to 2% cash discount, 10th Prox.

Requirements:

Payment: Our terms are: 10th Prox., net thirty days, and no rebate will be allowed unless complete settlement of our account per statement rendered is received not later than the 15th of the month and for purchases shown on statement only.

10 . The above terms must be understood definitely, for we will not, under any consideration, allow this volume rebate unless your check is received not later than the 15th of the month as above stated.

Empire Coils are not guaranteed by us and are not subject to replacement or credit. Any part listed in our current catalogue, with the exception of Empire Coils, will be replaced at no charge if it proves defective.

Return Merchandise: The Distributor wishing to make returns of our merchandise for exchange under our obsolescence policy must write our main office listing parts to be exchanged and received our written consent and return merchandise label before making shipment. All Returns Are To Have Charges Prepaid.

Merchandise will be accepted for merchandise credit only if listed in the buyer's guide of current catalogue at prevailing selling prices at time of return, less 10% handling charge. All merchandise to be of our manufacture only. No return of assortments, testers, gears, platinum contacts or Super Chief Magnetos and Super Chief Magneto parts.

This supersedes any contracts or agreements of like nature previously made.

....
Distributor

P. & D. Manufacturing Co., Inc.
By .... By ....
Ra 1

11 "B"

P. & D. MANUFACTURING CO., INC.
DISTRIBUTOR'S REBATE AGREEMENT

This Agreement entered into this .... day of .... between P. & D. Manufacturing Co., Inc., Long Island City, New York, known as the Manufacturer and
(Firm) ....
(City) .... (State) ....
(Firm) ....
known as the Distributor, wherein the Distributor hereby agrees to purchase his or their entire requirements of ignition repair parts as catalogued from the Manufacturer from the above date until ....

In Consideration of the above agreement, the Manufacturer agreed to allow the Distributor the following rebates instead of the usual 2% of the value of all invoices, Except on Cabinent Assortments and Merchandisers, Super Chief Magnetos and Super Chief Magneto parts.

Volume: The amount or rebate earned will be determined by the net purchases shown on your monthly statement.

On monthly purchases of:	$200.00 to 299.00	$300.00 to 399.00	$400.00 to and up
Discounts will be:	10%	13%	15%

Cabinet Assortments and Merchandisers are subject to a maximum rebate of ten percent (10%) only.

Super Chief Magnetos and Super Chief Magneto parts are subject only to 2% each discount, 10th Prox.

Requirements:

Payment: Our terms are: 10th Prox., net thirty days, and no rebate will be allowed unless complete settlement of our account per statement rendered is received not later than the 15th of the month and for purchases shown on a statement only.

12 The above terms must be understood definitely, for we will not, under any consideration, allow this volume rebate unless your check is received not later than the 15th of the month as above stated.

Empire Coils are not guaranteed by us and are not subject to replacement or credit. Any part listed in our current catalogue, with the exception of Empire Coils, will be replaced at no charge if it proves defective.

Return Merchandise: The Distributor wishing to make returns of our merchandise for exchange under our obsolescence policy must write our main office listing parts to be exchanged and receive our written consent and return merchandise label before making shipment. All Returns Are To Have Charges Prepaid.

Merchandise will be accepted for merchandise credit only if listed in the buyer's guide of current catalogue at prevailing selling prices at time of return, less 10% handling charge. All merchandise to be of our manufacture only. No return of assortments, testers, gears, platinum contacts or Super Chief Magnetos and Super Chief Magneto parts.

This supersedes any contracts or agreements of like nature previously made.

....
Distributor

P. & D. Manufacturing Co., Inc.
By: .... By: ....
Ra 2

13 "C"

P. & D. MANUFACTURING CO., INC.
Long Island City, N.Y.

DISTRIBUTORS FRANCHISE AGREEMENT
Application and Acceptance

................19

Application of ....
of ....

for appointment as Distributor of P. & D. products manufactured by
P. & D. Manufacturing Co., Inc., Long Island City, New York (hereinafter referred to as the "Factory").

Applicant represents that it is engaged in jobbing automotive parts, repair materials and equipment; that more than eighty per cent of its sales are at wholesale, and that it can qualify as a jobber of all P. & D. lines, entitling it to the regular Jobber's discount offered to all Jobbers by said Factory.

No. 1 In order to earn the additional standard Distributorship compensation, Applicant agrees to perform, at its own cost, services and promotion of Factory interests, as follows:—

(a) Applicant will carry in stock a complete variety of products for which it is Distributor, and will not carry or sell any competing items or materials except by specific consent of the Factory.

(b) It will consistently employ eight or more travelling salesmen, each of whom will carry a complete factory catalog and such other sales or engineering data as may be prescribed by the Factory.

14 (c) It will allocate one or more employees acceptable to the Factory, for not less than one man-week in any year or not more than three man-weeks in any year, for field instruction prescribed by the Factory. Applicant's employees who have been so Factory-trained, shall in every way assist applicant's salesmen in the promotion of sales of P. & D. products, shall act for the Factory in handling complaints in applicant's territory, and shall between visits of Factory representatives administer applicant's stocks of P. & D. products so that at all times the Distributor is in position to render full service.

(d) Applicant, as a Distributor, shall serve any P. & D. Jobber that so desires to buy from Distributor at current Jobber prices, but the Factory may not demand that the applicant thus serve Jobbers except where the P. & D. Jobber, as stated above, desires to do business with the Distributor; and at all times P. & D. Manufacturing Co., Inc. reserves the right to sell any P. & D. Jobber direct in the event that the said Distributor and such P. & D. Jobber do not co-operate.

(e) P. & D. products resold by the Distributor to Jobbers shall be considered a part of the applicant's total purchase of any products group, thus making available to the Distributor any volume rebate or compensation which the factory will offer on one or more products groups.

(f) Payment by applicant for merchandise purchases as a Distributor shall be met on the 10th of the month following such billing, and it is agreed that in any month when such payment is delayed beyond the 10th, all billings of that month will omit the Distributorship compensation.

(g) Applicant will at all times carry current Factory literature to be distributed under Factory instructions, and shall be faithful in its prompt and earnest efforts to follow up inquiries re- 15 ceived by the Factory as a result of general advertising, and shall in all other ways serve the Factory as the Factory branch within a prescribed logical area.

(h) The Distributor wishing to make returns of our merchandise for exchange under our Obsolescence Policy will write P. & D. Manufacturing Co., Inc., main office, listing parts to be exchanged, and receive our written consent and return merchandise label before making shipment. Such Returns Will Have Charges Prepaid.

No. 2 The Distributors compensation shall be in the form of a cash discount on billing at regular Jobber prices as follows: 20% and 2% on all monthly purchases with the exception of the following that have a lesser discount; Cabinets and Assortments carry 10% only;

(b) Merchandise will be accepted for merchandise credit only if listed in the buyer's guide of current catalog at prevailing selling prices at time time of return, less 10% handling charge.

No. 3 It is mutually agreed that this Francise expires as of December 25th, 19........

....

Applicant.

By ....

Application accepted and Franchise effective in the above terms, this .... day of ...., 19......

P. & D. Manufacturing Company, Inc.
By ....

16-21 • • •

22

UNITED STATES OF AMERICA
Before Federal Trade Commission

Stamp—Federal Trade Commission Received Sep 28 1951 Secretary

• • (Caption—No. 5913) • •

ANSWER

Now comes P. & D. Manufacturing Co., Inc., a Corporation, by Halfpenny & Hahn, its attorneys, and answering the Complaint herein says:

1. Answering Paragraph One of the Complaint, Respondent admits that it is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 19-02 Steinway Street, Long Island City, 5, New York.

2. Answering Paragraph Two of the Complaint, Respondent admits that it is now and has for years been engaged in the manufacture, sale and distribution of automotive products and supplies to purchasers located in various States of the United States and in the District of Columbia.

Respondent admits that some of its products when sold are transported from its place of business to purchasers thereof located in various states other than the State of origin.

23

Respondent denies that many of the purchasers of its products and many of the purchasers of similar products from respondent's competitors are competitively engaged, the one with the other, in the resale and redistribution of automotive products.

3. Answering Paragraph Three of the Complaint, Respondent admits that it is now in active competition with other corporations, partnerships, firms and individuals engaged in the manufacture and sale of comparable automotive products.

4. Answering Paragraph Four of the Complaint, Respondent denies it is now or has since June 19, 1936, been discriminating in price between purchasers of its products of like grade and quality, by selling such products to some purchasers at higher prices than to others, competitively engaged in the resale thereof within the United States.

(A) Respondent admits that it enters into "Distributor Franchise Agreements" with some of its purchasers schedules as set forth in Exhibits "A" and "B" which are attached to the Complaint.

(B) Respondent admits that it enters into "Distributor Franchise Agreements' with some of its purchasers whereby respondent grants discounts of 20% and 2%
off its jobber list prices on all monthly purchases with
24 the exception of cabinets and assortments which have
a 10% discount.

(C) Respondent admits that it enters into a Distributor Franchise Agreement" with organizations composed of, or representing, purchasers whereby such organizations received the discount provided for in such agreement on purchases made by it.

5. Answering Paragraph Five of the Complaint, Respondent denies the allegations contained therein.

6. Answering Paragraph Six of the Complaint, Respondent denies the allegations contained therein.

7. Answering Paragraph Seven of the Complaint, Respondent denies the allegations contained therein.

8. For further answer to the Complaint herein, Respondent states that if any price differentials do exist in the sale price of the products it sells, such price differentials

(a) make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which said products are sold or delivered; or

(b) are functional and are based on the services by the purchaser in the sale and distribution of respondent's products; or

(c) have been made in good faith to meet an equally low price of a competitor.

25 That any difference in price which may exist does not substantially lessen competition, tend to create a monopoly in commerce or to injure, destroy or prevent competition.

9. Respondent denies each and every allegation of said Complaint not hereinbefore specifically admitted and asks for strict proof thereof.

10. Respondent alleges that if the conclusions stated in Paragraphs Four, Five and Six of said Complaint as to the alleged acts and practices of the respondent, are deemed to constitute violations of the provisions of Subsection (a) of Section 2 of the Clayton Act, (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, Approved June 19, 1936, then said Act if so interpreted and if applied to the respondent is violative of the Respondent's Constitutional rights under Article V of the Amendments to the Constitution of the United States and an unreasonable and unlawful exercise of the power granted under Subsection Three of Section 8 of Article I of the Constitution of the United States.

11. Respondent alleges that the provisions of Subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, Approved June 19, 1936, are so vague and indefinite that an attempt to enforce said provisions in this proceedings against this Respondent would constitute a violation of Respondent's Constitutional rights under Article V of the Amendments to the Constitution of the United States.

26 Wherefore, Respondent prays that said Complaint be dismissed.

P. & D. Manufacturing Co., Inc.,
a Corporation,
By /s/ Halfpenny & Hahn
Its Attorneys.

Halfpenny & Hahn,
Attorneys for Respondent,
111 W. Washington St.,
Chicago 2, Illinois.

37.

United States of America
BEFORE FEDERAL TRADE COMMISSION
Federal Trade Commission—Received Sep. 7, 1954

• • (Caption—No. 5913) • •

MOTION TO DISMISS.

Now comes P. & D. Manufacturing Co., Inc., by Halfpenny, Hahn & Cassedy, its attorneys, at the close of the Commission's case and respectfully moves that an order be entered dismissing the complaint for the reasons that the Commission failed to prove:

A. That the schedule of discounts were beyond the financial ability of respondent's customers.

B. That the differences in the discount structure were sufficient to influence the resale price.

C. Economic factors as between competing purchasers.

D. Affirmatively that there was a reasonable probability of injury to competition.

E. That the alleged practices tended substantially to lessen competition, or to create a monopoly, or to injure, destroy or prevent competition within the meaning and intent of Section 2(A) of the Clayton Act, as amended.

P. & D. Manufacturing Co., Inc.
By Halfpenny, Hahn & Cassedy
Its Attorneys

Halfpenny, Hahn & Cassedy
1001 Connecticut Ave., N.W.
Washington, D. C.
EXecutive 3-1611

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
Federal Trade Commission—Received Sep. 7, 1954

• • (Caption—No. 5913) • •

MOTION TO DISMISS AS TO PRIMARY LINE COMPETITIVE INJURY

Now comes P. & D. Manufacturing Co., by Halfpenny, Hahn & Cassedy, its attorneys, at the close of the Commission's case and respectfully moves that an order be entered dismissing the complaint as to Primary Line Competitive Injury.

P. & D. Manufacturing Co., Inc.
By Halfpenny, Hahn & Cassedy
Its Attorneys

Halfpenny, Hahn & Cassedy
1001 Connecticut Ave., N.W.
Washington, D. C.
EXecutive 3-1611

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
Federal Trade Commission—Received Sep. 7, 1954

* * (Caption—No. 5913) * *

MOTION TO REQUIRE COMMISSION TO ELECT.

Now comes P. & D. Manufacturing Co., Inc., by Halfpenny, Hahn & Cassedy, its attorneys, at the close of the Commission's case and alleges that the attorneys in support of the complaint have introduced voluminous documentary evidence consisting of tabulation of dollar amounts for the year 1950 of two-hundred and thirty-five (235) accounts of the respondent located in fourteen (14) states, which transactions involved many thousands of individual sales transactions and which required hundreds of manhours to compute.

That this plethora of evidence places an unsurmountable burden of analyses and proof upon the respondent by requiring a breakdown of thousands of invoices and cost allocations requiring hundreds of manhours of time and extensive, exorbitant and needless expense, and placing the respondent in a situation where it is impossible to marshal facts, figures and testimony to be introduced in evidence in rebuttal.

40 Wherefore, the respondent prays that an order be entered directing and requiring the Commission and the attorneys in support of the complaint to elect and specify from the evidence introduced in the record the sales transactions with a reasonable number of customers (not to exceed ten) involving the alleged price discrimination upon which the Commission and the attorneys in support of the

complaint are relying to prove unlawful discrimination and competitive injury.

P. & D. Manufacturing Co., Inc.
By Halfpenny, Hahn & Cassedy
Its Attorneys

Halfpenny, Hahn & Cassedy
1001 Connecticut Ave., N.W.
Washington, D. C.
EXecutive 3-1611

41-42 * * *

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
Federal Trade Commission—Received Nov. 24, 1954

* * (Caption—Docket No. 5913) * *

RESPONDENT'S PROPOSED FINDINGS AND CONCLUSIONS.

The following proposed findings and conclusions, together with the reasons therefor, with exact references to the record and the authorities relied on, are filed and submitted herewith by the respondent, P. & D. Manufacturing Co., Inc., in accordance with Rule XXI of the Commission's Rules of Practice, solely for consideration by the Hearing Examiner in making the Initial Decision in this proceeding, upon the condition that the respondent does not thereby waive or concede any matter of fact or law which may or may not be included herein and subsequently may be presented to the Commission or the Courts for decision.

FIRST PROPOSED FINDING.

The complaint in this proceeding charges the respondent, P. & D. Manufacturing Co., Inc., with discrim-
44 ination in price between different purchasers of its automotive products of like grade and quality, in

violation of sub-section (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

The Answer specifically denies the violation of law alleged.

RECORD REFERENCES.

Paragraph Seven of the Complaint.
Paragraph Seven of the Answer.

SECOND PROPOSED FINDING.

Respondent, P. & D. Manufacturing Co., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with principal office and place of business located at 19-02 Steinway Street, Long Island 5, New York.

RECORD REFERENCES.

Paragraph One of the Answer.

THIRD PROPOSED FINDING

Respondent is now, and for years has been, engaged in the manufacture of automotive products which it sells and distributes to purchasers located in various States of
45 the United States and in the District of Columbia,
and that some of its products when sold are transported from its place of business to purchasers thereof located in various States other than the State or origin.

RECORD REFERENCES.

Paragraph Two of the Answer.

FOURTH PROPOSED FINDING.

Respondent is in active competition with other corporations, partnerships, firms and individuals engaged in the manufacture and sale of comparable automotive products.

RECORD REFERENCES.

Paragraph Three of the Answer.

FIFTH PROPOSED FINDING.

Respondent enters into a "Distributors Rebate Agreement" contract with some of its purchasers, whereby in consideration of the purchaser's agreement to purchase his entire requirements of ignition repair parts from respondent during a certain period of time, respondent agrees to allow such purchasers rebates based upon the net purchases shown on their monthly statements, according to the following rebate schedules:

	(a)	$100.00 to 149.00	5%
		150.00 to 199.00	7%
		200.00 to and up	10%
46	(b)	$200.00 to 299.00	10%
		300.00 to 399.00	13%
		400.00 to and up	15%

In such contracts respondent agrees to allow these rebates instead of the usual 2% of the value of all invoices, except on Cabinet Assortments and Merchandisers, which are subject to a maximum rebate of 10% only, and Super Chief Magnetos and Super Chief Magneto parts which are subject only to 2% cash discount, 10th Prox. The agreed terms of payment are: 10th Prox, net thirty days, and no rebate will be allowed unless complete settlement of the account per statement rendered is received not later than the 15th of the month and for purchases shown on the statement only.

RECORD REFERENCES.

Paragraph Four 1 of the Complaint.
Forms "A" and "B" attached to the Complaint.
Commission Exhibits No. 15B and No. 15C.
Paragraph Four (A) of the Answer.

SIXTH PROPOSED FINDING.

Respondent enters into a "Distributors Franchise Agreement" contract with some of its purchasers wherein the purchaser applies for appointment as Distributor of respondent's products; and expressly represents that Applicant is engaged in jobbing automotive parts, repair materials and equipment, that more than eighty per cent 47 sales are at wholesale, and that it can qualify as a jobber of all P. & D. lines, entitling it to the regular Jobber's discount offered to all Jobbers by respondent. These contracts provide in substance the following:

No. 1. In order to earn the additional standard Distributorship compensation, Applicant agrees to perform, at its own cost, services and promotion of Factory (respondent) interests, as follows:

(a) Applicant will carry in stock a complete variety of products for which it is Distributor, and will not carry or sell any competing items or materials except by specific consent of the Factory (respondent).

(b) It will consistently employ eight or more travelling salesmen, each of whom will carry a complete Factory (respondent) Catalog and such other sales or engineering data as may be prescribed by the Factory (respondent).

(c) It will allocate one or more employees acceptable to the Factory (respondent), for not less than one man-week in any year or not more than three man-weeks in any year, for field instruction prescribed by the Factory (respondent). Applicant's employees 48 who have been so Factory (respondent) trained, shall in every way assist applicant's salesmen in the promotion of sales of P. & D. products, shall act for the Factory (respondent) in handling complaints in applicant's territory, and shall between visits of

Factory (respondent) representatives administer applicant's stocks of P. & D. products so that at all times the Distributor is in position to render full service.

(d) Applicant, as a Distributor, shall serve any P. & D. Jobber that so desires to buy from Distributor at current Jobber prices, but the Factory (respondent) may not demand that the applicant must serve Jobbers except where the P. & D. Jobber, as stated above, desires to do business with the Distributor; and at all times P. & D. Manufacturing Co., Inc., reserves the right to sell any P. & D. Jobber direct in the event that the said Distributor and such P. & D. Jobber do not cooperate.

(e) P. & D. products resold by the Distributor to Jobbers shall be considered a part of the applicant's total purchase of any products group, thus making available to the Distributor any volume rebate or
49 compensation which the Factory (respondent) will offer on one or more products groups.

(f) Payment by applicant for merchandise purchases as a Distributor shall be met on the 10th of the month following such billings, and it is agreed that in any month when such payment is delayed beyond the 10th, all billings of that month will omit the Distributorship compensation.

(g) Applicant will at all times carry current Factory (respondent) literature to be distributed under Factory (respondent) instructions, and shall be faithful in its prompt and earnest efforts to follow up inquires received by the Factory (respondent) as a result of general advertising, and shall in all other ways serve the Factory (respondent) as the Factory (respondent) branch within a prescribed logical area.

(h) The Distributor wishing to make returns of our (respondent) merchandise for exchange under our (respondent) Obsolescense Policy will write P. & D. Manufacturing Co., Inc., main office, listing parts to be exchanged, and receive our (respondent) written consent and return merchandise label before making shipment. Such returns will have charges prepaid.

50 No. 2. The Distributors compensation shall be in the form of a cash discount on billings at regular Jobber prices as follows: 20% and 2% on all monthly purchases with the exception of the following that have a lesser discount; Cabinets and Assortments carry 10% only;

(b) Merchandise will be accepted for merchandise credit only if listed in the buyer's guide of current catalog at prevailing selling prices at time of return, less 10% handling charge.

No. 3. It is mutually agreed that this Franchise expires as of December 25th, 19 .

____

Applicant

By____________________

Application accepted and Franchise effective in the above terms, this day of 19 .

P. & D. Manufacturing Company, Inc.

By____________________

RECORD REFERENCES.

Paragraph Four 2 of the Complaint.
Form "C" attached to the Complaint.
Commission Exhibit No. 15A.
Paragraph Four (B) of the Answer.

SEVENTH PROPOSED FINDING.

51 Respondent enters into a "Distributors Franchise Agreement" contract with organizations composed of, or representing, purchasers whereby respondent agrees to grant or allow such organizations rebates on purchases made by such organization as provided by the terms of such contract.

RECORD REFERENCES.

Paragraph Four 3 of the Complaint.
Paragraph Four (C) of the Answer.

EIGHTH PROPOSED FINDING.

Respondent enters into a "Distributors Fuel Pumps Franchise Agreement" contract with some of its purchasers in substantially the same terms as set forth in the "Distributors Franchise Agreement" contracts and providing that the Distributors rebate off regular Jobber's price shall be 20% and 2% Tenth Prox.

RECORD REFERENCE.

Commission Exhibits No. 17A and No. 17B.

NINTH PROPOSED FINDING.

The automotive products manufactured, sold and distributed by respondent are classified: (1) "Genuine P. & D. Starting, Lighting, Ignition Parts", (2) "Genuine P. & D. Fuel Pumps, Rebuild Kits, Diaphragm Kits",
52 and (3) "Carburetor Kits". Commission Exhibits No. 1, No. 2, No. 3, and No. 4 which are respondent's catalogs No. 49, No. 49A, No. 49B, and F-49, describe the parts in the first classification, on the pages of catalog No. 49 indicated, as follows:

		Page
1.	A variety of assortments of parts in Merchandiser Cabinets	53-56
2.	Starter and Generator Brushes	72-73
3.	Distributor, Starter and Generator Bushings	79-80
4.	Ignition Coils	57-60
5.	Condensers	66-67
6.	Contact Arms and Screws	64-65
7.	Generator Cut-outs	63
8.	Dimmer Switches	75
9.	Distributor Caps	70-71
10.	Distributor Leads	78
11.	Distributor Plates	64
12.	Distributor Rotors	68-69
13.	Horn Relays	63
14.	Light Relays	63
15.	Miscellaneous Ford Items (Gaskets, Coil Brushes, Connectors, Plates, Ignition Coil Resistor Unit, Ignition Coil Resistor and Circuit Breaker Assembly, Ignition Coil Resistor and Double Circuit Breakers)	78
53 16.	Starter Spring Screws and Washers	77
17.	Starter Switches and Solenoid Starter Switch Kits	74-77
18.	Voltage Regulators	61-62

Commission Exhibit No. 9, which is respondent's catalog No. FP-1, describes the parts in the second classification, on the pages indicated as follows:

		Page
19.	Carburetor Choke Assemblies	87
20.	Cork Gaskets	77
21.	Diaphragm Kits	92-93
22.	Fuel Filters	96
23.	New Fuel Pumps	78-87

24. Glass Bowl and Gasket 77
25. Major and Minor Fuel Pump and Combination Fuel and Vacuum Pump Rebuild Kits.............. 88-91
26. Push Rods to fit Ford, Mercury and Lincoln.... 77

Commission's Exhibits No. 13A, B, C, and D and No. 14A, B, C, and D, which are respondent's Catalogs No. C-49 and No. C-50, describe the parts in the third classification, as follows:

27. Carburetor Kit Assortment to service Ford-Chevrolet-Plymouth.
28. Carburetor Repair Kits.
29. Carburetor Gasket Packets.

54 RECORD REFERENCES.

Commission Exhibits Numbered 1, 2, 3, 4, 9, 13 and 14.

TENTH PROPOSED FINDING.

The Complaint alleges that in the course and conduct of its business, respondent is now, and since June 19, 1936, has been, discriminating in price between purchasers of its products of like grade and quality, by selling such products to some purchasers at higher prices than to others, competitively engaged in the resale thereof within the United States; and that this price discrimination, is and has been, principally caused by the fact that respondent distributes its products through the medium of the three separate contracts, hereinabove described as "Distributors Rebate Agreement" contracts, marked "A" and "B", and as "Distributors Franchise Agreement" contract, marked "C".

The Answer specifically denies these allegations.

RECORD REFERENCES:

Paragraph Four of the Complaint.
Forms "A", "B", and "C" attached to the Complaint.
Commission's Exhibits No. 15B, No. 15C, and No. 15A.

ELEVENTH PROPOSED FINDING.

55 The Complaint charges that in the sale and distribution of its products in commerce, as aforesaid, respondent is now, and since June 16, 1936, has been, further engaged in price discrimination by allowing or granting to some purchasers varying rebates or discounts, off of its jobber list prices, different from, other than, or in addition to, the rebates or discounts provided in its "Distributors Rebate Agreement" contracts, marked "A" and "B", and its "Distributors Franchise Agreement" contracts, marked "C", and not granting or allowing such rebates or discounts to other purchasers, of its products of like grade and quality, who are competitively engaged in the resale of such products in the United States and in the District of Columbia with the purchasers receiving such rebates or discounts.

The Answer specifically denies these allegations.

RECORD REFERENCES.

Paragraph Five of the Complaint.
Paragraph Five of the Answer.

TWELFTH PROPOSED FINDING.

The Complaint alleges that the effect of the aforesaid discriminations in price has been, or may be, substantially to lessen competition, or to injure, destroy or prevent competition in the manufacture, sale, and distribution of such automotive products; and the effect of said dis-

56 crimination has been, or may be, to tend to create a monopoly in the lines of commerce in which respondent and in which its favored purchasers are engaged, or to injure, destroy or prevent competition with respondent, with the favored purchasers, or with customers of either of them.

The Answer specifically denies these allegations.

RECORD REFERENCES.

Paragraph Six of the Complaint.
Paragraph Six and Eight of the Answer.

THIRTEENTH PROPOSED FINDING.

In view of the foregoing admitted facts, the contested issues raised by the allegations of the Complaint and the denials of the Answer are limited, and since the respondent has offered no evidence and relies upon the failure of Counsel in support of the Complaint, who has the burden of proof, to establish the alleged violation of law by reliable, probative and substantial evidence, the questions now presented for decision are as follows:

(a) Does the record contain reliable, probative and substantial evidence establishing that respondent has discriminated in price between different purchasers of its automotive products of like grade and quality, by granting larger discounts or rebates on the same type of products to some purchasers than to others, competitively engaged in the resale thereof?

57 (b) If it is assumed that such discrimination has been established, does the record contain reliable, probative and substantial evidence that the effect thereof may be substantially to lessen, injure, destroy, or prevent competition with respondent, or tend to create a monopoly in the line of commerce in which respondent is engaged (the primary line)?

(c) If it is assumed that such discrimination has been established, does the record contain reliable, probative and substantial evidence that the effect thereof may be substantially to lessen, injure, destroy, or prevent competition with the favored purchasers, or tend to create a monopoly in the line of commerce in which the favored purchasers are engaged (the secondary line)?

(d) If it is assumed that such discrimination has been established, does the record contain reliable, probative and substantial evidence that the effect thereof may be substantially to lessen, injure, destroy, or prevent competition with customers of the favored purchasers, or tend to create a monopoly in the line of commerce in which customers of the favored purchasers are engaged (the tertiary line)?

RECORD REFERENCES.

Paragraphs Four, Five and Six of the Complaint.

FOURTEENTH PROPOSED FINDING.

To support the contested allegations Counsel in support of the Complaint selected 1960 as the sample year and 58 Boston, Massachusetts and Scranton, Pennsylvania as two typical places when and where the alleged discriminations in price occurred. In the opinion of the Hearing Examiner, the Counsel in support of the Complaint either have made or have not made their case out at Boston and at Scranton and if they have not made their case out at these two places, they cannot rely upon some other section where they have taken no testimony to prove it.

RECORD REFERENCES.

Tr. 180, 202, 218, 221 (references to the sample year 1960).

Tr. 422-424 (statements of the Hearing Examiner).

FIFTEENTH PROPOSED FINDING.

For the Boston area Counsel in support of the Complaint introduced the testimony of Charles S. Rogers, respondent's General Manager in Charge of Sales, (pp. 2-139, 375-397), Louis J. Roazen, Treasurer of Standard Auto Gear Co., Inc., (pp. 141-172), and Arthur C. Marquardt, the Treasurer of Hunt-Marquardt Ind., (pp. 173-227), and several charts as Commission Exhibits (C. Exs. No. 43A and B, 44, 46E, 47) showing in dollars and cents the total annual purchases of various purchasers of respondent's automotive products from which the Commission's accountants have computed allowable rebates. Standard Auto Gear Co., Inc., and Hunt-Marquardt, Inc. are automotive parts jobbers and are members of Six States Associates, 59 a Massachusetts trust, which is an organization of automotive parts jobbers. This organization has eleven (11) members and forty-five (45) branch stores. (pp. 177, 178). Roazen and Marquardt are Trustees. (p. 179).

The evidence shows that during the sample year 1950 Six States Associates had about 16 different suppliers, of which respondent was one. (p. 180). Four members of the organization, namely William T. Manning Co., Mellor's Auto Parts, Standard Auto Gear Co., Inc., and Tarbell-Watters Co., purchased and resold respondent's automotive products during the year 1950 in the Boston area. (p. 181). With the exception of certain drop shipments delivered directly to one or two customers of these purchasers, other shipments were delivered directly to these four purchasers. (pp. 201. C. Exs. No. 24). All invoices and billing were handled by the Six States Associates' office. On these purchases respondent allowed Six States Associates 20% and 2% as discounts with the exception of Cabinets and Assortments on which 10% was allowed. (p. 183). After deduction of the discounts the bills for

these four members were paid by Six States Associates. Six States Associates then billed each of the four members, allowing discounts of 15% and 2% to two of them (pp. 146, 163, 164, 165, 166, 169, 184, 185) and 10% and 2% to the other two (pp. 184, 185). At the end of the year Six States Associates distributed to each member of the organization its proportionate share in the earnings of the organization on total purchases from all suppliers. (pp. 197, 198, 199, 200. C. Exs. No. 44, 47). The charts indi-
60 cate that the total percentage of discounts and rebates allowable to these four purchasers through this purchasing arrangement was substantially the same amount to each of them. (p. 170, C. Exs. No. 43A, 43B, 44, 46E and 47).

The evidence is undisputed that the four members of Six States Associates purchasing respondent's automotive products did not overlap in their trading areas and did not compete with each other in the resale of respondent's products (pp. 221, 222, 226). The charts introduced as Commission Exhibits contain what purports to be the names of purchasers of respondent's automotive products other than members of Six States Associates, but, as stated by Counsel in support of Complaint, the charts were not presented to show competition (p. 277) and, in the opinion of the Hearing Examiner, the charts do not establish competition between purchasers of respondent's products. In addition there is no evidence whatsoever establishing that any two purchasers purchased the same type of parts from the respondent at different prices and were competitively engaged in the resale thereof in the Boston area.

RECORD REFERENCES.

Tr. 2-139, 141-172, 146, 163, 164, 165, 166, 169, 170, 173-227, 177, 178, 179, 180, 181, 183, 184, 185, 201, 202, 221, 222, 226, 277.

Commission Exhibits No. 24, 43A and B, 44, 46E, 47.

SIXTEENTH PROPOSED FINDING.

61 For the Scranton area Counsel in support of the Complaint introduced the testimony of Charles S. Rogers, respondent's General Manager in Charge of Sales, (pp. 2-139, 375-397), representatives of seven automotive parts jobbers, namely Shapiro Auto Supply, Kitsee Auto Store, Stull Brothers, Sterling Auto Supply, Hi-Grade Auto Supply Co., Penn Auto Parts, and Dave's Auto Supply, and several charts (Commission's Exhibits No. 46C and 46D) showing in dollars and cents the total annual purchases of various purchasers, including the above named jobbers, of respondent's automotive products in the Scranton area during the year 1950, from which the Commission's accountants have computed the total annual rebates and discounts allowed each purchaser.

RECORD REFERENCES.

Tr. 2-139, 375-397.
Commission's Exhibits No. 46C and 46D.

SEVENTEENTH PROPOSED FINDING.

The evidence shows that during the sample year 1950 in the Scranton area two of the above named automotive parts jobbers, namely Shapiro Auto Supply and Dave's Auto Parts discontinued and ceased handling respondent's automotive products and since they are no longer handling such parts there is no possibility or probability of injury to competition between such jobbers and other jobbers, who are continuing to purchase respondent's automotive products, as the result of respondent's pricing practices.

62 ### RECORD REFERENCES.

Tr. 286, 293, 294, 366.

EIGHTEENTH PROPOSED FINDING.

Commission's Exhibit Nos. 46C and 46D show that during the sample year 1950 in the Scranton area two of the above named automotive parts jobbers, namely Stull Brothers and Penn Auto Parts were allowed total annual rebates and discounts of 14.81% and 14.79% respectively, on their total annual purchases of respondent's automotive products, and three of the above named automotive parts jobbers, namely Kitsee Auto Store, Sterling Auto Supply and Hi-Grade Auto & Supply received total annual rebates and discounts of 11.96%, 9.72% and 10% respectively, on their total annual purchases of respondent's automotive products. The testimony discloses, however, that Stull Brothers and Penn Auto Parts each received 15% discount on all purchases of respondent's automotive products. (pp. 324, 326, 357). The testimony also discloses that all of these jobbers took the 2% cash discount granted by respondent to all purchasers who paid their bills by the 10th of the succeeding month after the purchases were made.

RECORD REFERENCES.

Tr. 310, 312, 324, 326, 329, 350, 351, 357, 359, 344.
Commission's Exhibit Nos. 46C and 46D.

63 NINETEENTH PROPOSED FINDING.

The representative of Kitsee Auto Store testified that if another automotive parts jobber received a larger discount on the same type of automotive product purchased from respondent it would not hurt or affect Kitsee Auto Store in any way, shape or form, that where other jobbers buy in larger quantities and get large discounts, it takes a longer time to move the stock, and where you buy in small quantities, there is a quick turnover.

RECORD REFERENCES.

Tr. 316, 317, 320.

TWENTIETH PROPOSED FINDING

The representative of Sterling Auto Supply testified that he handles approximately 75 lines of automotive parts (p. 338) and that his purchases of respondent's automotive products in 1950 were 1% of his total volume (p. 345). Commission's Exhibit 46D shows that his total billing for respondent's automotive products was $1513.94. If this amount is 1% the total volume purchased from all suppliers would be approximately $151,394.00. He testified that he is not a price buyer, that his business has been built on quality merchandise, that he has never questioned the price and does not make a point of obtaining the most favorable price offered by the manufacturer (p. 342).

From these facts it is obvious that respondent's larg-
64 est volume discount or rebate was available and within the financial purchasing ability of Sterling Auto Supply if it had desired to obtain such discount or rebate.

RECORD REFERENCES.

Tr. 338, 342, 345.
Commission's Exhibit No. 46D.

TWENTY-FIRST PROPOSED FINDING.

The representative of Hi-Grade Auto & Supply Co. testified that he handled 300 lines of automotive products, (p. 347), that he does not purchase according to any price, that he keeps a perpetual inventory and when purchasing from respondent makes no attempt to get a certain volume in any single order, that he receives a straight discount of 10% (pp. 348, 349). From these facts it is obvious that respondent's largest volume discount or rebate was available and within the financial purchasing ability of Hi-Grade Auto & Supply Co. if it had desired to obtain such discount or rebate.

RECORD REFERENCES.

Tr. 347, 348, 349.

TWENTY-SECOND PROPOSED FINDING.

The evidence shows that during the sample year 1950 all of the above named automotive parts jobbers in
65 the Scranton area purchased numerous lines of automotive parts from many different manufacturers, including respondent, which they resold to garages, car dealers, gasoline service stations, etc. Four of these jobbers, namely Shapiro Auto Supply, (p. 285), Stull Brothers, (p. 323), Sterling Auto Supply, (p. 343), and Penn Auto Parts, (p. 357) resold automotive parts to other automotive parts jobbers.

RECORD REFERENCES.

Tr. 285, 323, 343, 357.

TWENTY-THIRD PROPOSED FINDING.

The charts introduced as Commission Exhibits contain what purports to be the names of purchasers of respondent's automotive products, other than the above named jobbers, in the Scranton area during 1950, but, as stated by Counsel in support of the Complaint, the charts were not presented to show competition (p. 277) and, in the opinion of the Hearing Examiner, the charts do not establish competition between purchasers of respondent's products.

RECORD REFERENCES.

Tr. 277.

TWENTY-FOURTH PROPOSED FINDING.

The evidence introduced by Counsel in support of the Complaint relative to the Scranton area wholly fails 66 to establish competition between the automotive parts jobber purchasing respondent's automotive products in the resale of such products, since the following necessary and essential facts were not proved.

(1) The type of automotive parts purchased by each of the above named automotive parts jobbers from respondent.

(2) The date when the various types of automotive parts were purchased by each of the above named automotive parts jobbers from respondent.

(3) The type of respondent's automotive parts resold by each of the above named automotive parts jobbers to garages, car dealers, gasoline service stations, etc., which are the retail outlets.

(4) The type of respondent's automotive parts resold by the four above named jobbers to other automotive parts jobbers which are the wholesale outlets.

(5) The dollar volume of monthly purchases of respondent's automotive parts by each of the above named jobbers during 1950.

(6) The amount of discount or rebate granted by respondent on each monthly purchase of its automotive parts by each of the above named jobbers during 1950.

(7) Separate sales by the respondent of the same type of its automotive parts at different prices to any two automotive parts jobbers.

(8) That any two jobbers purchasing respondent's 67 automotive products at varying discounts or rebates were competitively engaged in the resale of the same type of respondent's automotive parts.

RECORD REFERENCES.

Analysis of the evidence introduced in support of the Complaint.

TWENTY-FIFTH PROPOSED FINDING

Respondent's automotive products as classified and described in the Commission's Exhibits are entirely different commodities, with different designs, purposes and functional uses. Some are for one make and model of an automobile, truck, motor cycle, etc., while others are for different makes and models. The different types of parts are not interchangeable. The term "ignition" parts line" refers to eighteen different types; the term "fuel pump line" refers to eight different types; and the term "carburetor kits" refers to three different types. All twenty-nine types are classed as automotive parts. In like manner champagne and Poland Spring Water are classed as beverages; coal, wood, oil and gas are classed as fuel; and hats, suits, ties, shirts, sox, and shoes are classed as haberdashery. But the purchaser of one type of beverage, fuel, haberdashery, or of automotive parts does not compete with another purchaser of a different type of beverage, fuel, haberdashery, or of automotive parts, in the resale of the two different types of commodities.

68 RECORD AND OTHER REFERENCES

Commission's Exhibits Numbered 1, 2, 3, 4, 9, 13 and 14.
Tr. 192; 223, 224.

[In the Matter of P. Sorensen Manufacturing Co., Inc., Docket No. 6052, involving substantially the same facts and alleged violation of law, Counsel in support of the Complaint, Schrup and Mayer, have offered evidence to show that purchasers of respondent's automotive products were reselling the same types of such parts in the same trade area during the same period of time. Apparently these attorneys believe that such evidence is necessary to establish that the purchasers of respondent's products are competitively engaged in the resale of such products, or that, in the absence of such evidence, Hearing Examiner J. Earl Cox will dismiss the Complaint. Such action has been indicated by the Hearing Examiner.]

TWENTY-SIXTH PROPOSED FINDING

The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. It was therefore necessary for Counsel in support of the Complaint, who have the burden of proof, to establish by reliable, probative and substantial evidence (1) that different jobbers purchasing respondent's automotive products were competitively engaged in the resale of the same type of product, (2) that respondent's largest volume discount was not available to some of such competing purchasers, and (3) that respondent's largest volume discount was not within the purchasing range of some of
69 such competing purchasers. Otherwise there is no discrimination even through some competing purchasers may buy smaller quantities and receive lesser discounts or rebates, since there is no inequality of treatment.

AUTHORITIES RELIED ON

Matter of Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937).

Matter of American Optical Co., 28 F.T.C. 169 (1939).

Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, pp. 18-21.

TWENTY-SEVENTH PROPOSED FINDING

Quantity discounts are among the oldest, most widely employed and best known of discount practices. They are common in retail trade, wholesale trade, and manufacturer-jobber relations. They are common in regulated as well as unregulated price structures. Congress refused to declare flatly that they are illegal. . . . It would be a far reaching decision to outlaw all quantity discounts. Courts [the F.T.C. and its Hearing Examiners] should not rush in where Congress feared to tread.

AUTHORITIES RELIED ON

Mr. Justice Jackson in Bruce's Juices *v.* American Can Co., 330 U.S. 743, 745-6 (1947).

70
TWENTY-EIGHTH PROPOSED FINDING

In Federal Trade Commission *v.* Morton Salt Company, the Supreme Court held in substance that there is a reasonable possibility that competition may be adversely affected by a practice under which manufacturers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers, but this ruling is based upon the principle underlying the Robinson-Patman Act that a large buyer should not be permitted to secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. In the present case all of respondent's volume discounts were available to all purchasers and there is no evidence establishing that any purchaser secured a competitive advantage over another purchaser solely because of the large buyer's purchasing ability. On the contrary the evidence clearly shows that all of the jobbers in the Scranton and Boston areas, about whom testimony was taken, had the financial ability to purchase the quantity necessary to qualify for respondent's largest discount or rebate.

AUTHORITIES RELIED ON

Federal Trade Commission *v.* Morton Salt Company, 334 U.S. 37 (1948).

TWENTY-NINTH PROPOSED FINDING

Commission action, under Section 7(c) of the Administrative Procedure Act, must be supported by reliable, 71 probative, and substantial evidence. And Counsel supporting the Complaint has the burden of proof. Respondents are not required to introduce any evidence and where that burden has not been sustained, the cases have been dismissed.

AUTHORITIES RELIED ON

60 Stat. 241, 5 U.S.C. 1006c. Opinions of Commission in Matters of Pillsbury Mills, Inc., Docket 6000, Champion Spark Plugs, Docket 3977, General Motors, etc., Docket 5620, and Auto Lite Company, Docket 5624.

THIRTIETH PROPOSED FINDING

The standard for determining the unlawfulness of an unjustified price discrimination, namely, the substantiality of the effects reasonably probable, is the same whether the competitive injury occurs at the seller level or at the customer level. The fact of injury is to be determined in all cases by a consideration of all the competent and relevant evidence and the inferences which may reasonably be drawn therefrom. Under differing circumstances the proof necessary to establish injury or even make out a prima facie case will differ.

AUTHORITIES RELIED ON

Opinion of the Commission in the Matter of General Foods Corporation, Docket 5675.

THIRTY-FIRST PROPOSED FINDING

72 There is no reliable, probative and substantial evidence establishing competition between any two automotive parts jobbers purchasing respondent's automotive products in the resale thereof. It therefore follows that there are no adverse effects to consider in the secondary line of commerce.

RECORD REFERENCES.

The entire record as hereinabove analyzed.

THIRTY-SECOND PROPOSED FINDING

There is no reliable, probative and substantial evidence establishing that as the result of respondent's pricing practices, any of the statutory adverse effects alleged in the Complaint are reasonably probable in the primary line of commerce in which respondent is engaged and in the opinion of the Hearing Examiner no case has been made out in the primary line.

RECORD REFERENCES.

Tr. 426. Statement of the Hearing Examiner.

THIRTY-THIRD PROPOSED FINDING

There is no evidence whatsoever with respect to the tertiary line of commerce or to adverse effects therein.

RECORD REFERENCES.

Unable to find any evidence in the record.

73 THIRTY-FOURTH PROPOSED FINDING

Assuming that there is reliable, probative and substantial evidence that respondent has discriminated in price between different purchasers of its automotive products, by granting larger discounts or rebates on the same type of products to some purchasers than to others, competitively engaged in the resale thereof, such discrimination is not a violation of the statute as alleged in the Complaint because there is no reliable, probative and substantial evidence that, as the result of respondent's pricing practices, the statutory adverse effects alleged in the Complaint are reasonably probable in the secondary line of commerce in which purchasers of respondent's automotive products are engaged.

RECORD REFERENCES AND AUTHORITIES RELIED ON

Analysis of the record evidence as hereinabove set forth. Note: The Federal Trade Commission has never in our opinion, relied solely upon the inference doctrine announced by the Supreme Court in the Morton Salt case but has, in every case, including the Morton Salt case, involving price discrimination, offered affirmative evidence of actual adverse effects upon competition. In the present case no such evidence has been introduced and Counsel in support of the Complaint are relying solely upon the inference doctrine.

CONCLUSION

At the conclusion of the evidence offered by Coun-
74 sel in support of the Complaint, respondent filed and
presented motions to dismiss the Complaint. After due consideration thereof and the entire record the Hearing Examiner is of the opinion that Counsel in support of the Complaint have failed to prove the allegations of the Complaint and, on motion of the respondent the Complaint will be dismissed.

....
Hearing Examiner

Respectfully submitted,
P. & D. Manufacturing Company, Inc.,
Respondent,
By /s/ James F. Flanagan
/s/ James W. Cassedy
Halfpenny, Hahn & Cassedy
Attorneys for Respondent.

Filed: November 24, 1954.

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UNITED STATES OF AMERICA
Before Federal Trade Commission
* * (Caption—Docket No. 5913) * *

PROPOSED FINDINGS, CONCLUSIONS AND PROPOSED ORDER BEFORE HEARING EXAMINER

To Hearing Examiner Earl J. Kolb:

Pursuant to Rule XXI of the Rules of Practice of the Federal Trade Commission, Eldon P. Schrup and Francis C. Mayer, attorneys supporting the complaint in the above entitled proceeding, submit to the Hearing Examiner their proposed findings, conclusions and proposed order therein, together with the reasons therefor, as hereinafter set forth:

First Proposed Finding:

Respondent P. & D. Manufacturing Co., Inc. (hereinafter referred to as "P. & D.") is a corporation organized and doing business under and by virtue of the laws of the State of New York, with principal office and place of business located at 19-02 Steinway Street, Long Island City 5, New York.

P. & D. is now, and for several years last past has been, engaged in the business of the manufacture, sale, and distribution of automotive products and supplies, principally ignition parts, fuel pump parts, carburetor parts, and other related items. Said products and supplies are sold by the respondent for use, consumption, or sale within the United States and the District of Columbia, to different purchasers of the same therein located, and respondent causes said products and supplies, so sold, to be shipped and transported from the state of its place of business to the purchasers thereof located in states other than the state wherein said shipment or transportation originated.

P. & D. maintains, and at all times mentioned herein has maintained, a course of trade in said products and supplies among and between the States of the United States and in the District of Columbia.

77 P. & D., in the course and conduct of its business, is now, and during the times mentioned herein, has been, engaged in active and substantial competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing comparable automotive products and supplies in commerce for consumption, use, and resale. Many of said purchasers and many of the aforesaid purchasers from P. & D. are competitively engaged each with the other in the resale and redistribution of said automotive products and supplies.[1]

Second Proposed Finding:

P. & D., in the course and conduct of its business, has been and is now marketing its above products of like grade and quality under its own brand name of P. & D. throughout the forty-eight states, maintaining warehouse space in the cities of Los Angeles, California; Kansas City, Missouri; Chicago, Illinois; Atlanta, Georgia; and Dallas, Texas.[2] In offering its products for sale, P. & D. classifies its products generally into two lines: ignition line, including carburetor kits and parts, and fuel pump line and related items.[3] At all times since 1936, P. & D. has offered and sold an ignition lines to its purchasers, adding the fuel pump line in 1950.[4]

During the year 1960, P. & D. sold its automotive products and supplies to approximately 800 accounts with total domestic sales of approximately $1,685,000.[5] In relation to the total sales of P. & D., the ignition line predominates, with the relatively newly offered fuel pump line accounting for a rather small portion of total over-all sales.[6] As an aid in the sale of its products, P. & D. employs approximately thirty salesmen covering the entire United States, who are paid on a commission basis related to the total amount of P. & D. sales in their respective territories.[7]

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[1] P. 2 of Answer; Tr. 284, 297, 306, 336, 347, 363, 390-395.

[2] CX 1, CX 9; Tr. 65-66.

[3] CX 1, CX 9; Tr. 65-66.

[4] CX 1, CX 9; Tr. 29-30.

[5] CX 20.

Third Proposed Finding:

During the sample year 1950, P. & D. distributed its products on the basis of contracts with its distributors and other customers, mainly according to the prices shown on the applicable jobber's price list.[8]

78 As shown by the exhibits of records[1], a monthly rebate was paid to the purchasers of products included in the ignition line as follows:

Net Purchases during each month	Monthly rebate
$100 to $149	5%
150 to 199	7%
200 to 299	10%
300 to 399	13%
400 and over	15%

On the fuel pump line a monthly rebate was paid a purchaser on the following basis:

Net Purchases during each month	Monthly rebate
$ 0 to $199	10%
200 and over	15%

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[6] CX 46-48; Tr. 38-39.

[7] Tr. 66-67.

[8] CX 4E, 5A, 6A, 6C, 7A, 8A, 10A, 11A, 13E, 14E.

[1] CX 15A, 15B, 15C, 17A, 17B.

Under the above rebate plans, purchasers were granted and received rebates applicable to their total monthly purchases, differing in amounts according to the total of their monthly purchases.

In the sale of both the above described lines, P. & D. further entered into distributor franchise agreements with some of its customers providing for monthly rebates on all of the purchases of those customers in excess of the amounts set forth in the tables above. These distributor's franchise agreements provide for a rebate of 20% on all purchases without regard to, or any limitation upon, the size of the monthly purchases of the franchise distributors.[2] Thus, in the sale of its ignition line P. & D. offered to its customers eight different buying prices ranging from sales upon which no monthly rebate was granted to the 20% monthly rebate granted to the franchise distributors, irrespective of the distributors's monthly volume of purchases. In the sale of its fuel pump line, P. & D. granted to its purchasers four different buying prices ranging from its jobber's list price without any rebate but subject to the 2% cash discount for prompt payment, to the 20% monthly rebate allowed its franchise distributors on all purchases, regardless of the total monthly purchase of those customers.

79 Illustrative of the actual net differences in purchase prices paid by P. & D. purchasers for such merchandise due to the granting by P. & D. and the receipt by such purchasers of the foregoing rebates and discounts are the exhibits of record showing tabulations of sales in certain localities.[1] These exhibits reflect differences in net buying prices in varying amounts and percentages, with

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[2] CX 15A, 17A, 46-48.

[1] CX 46A-46E, 47-48.

some differences amounting to as much as 20% of the net buying price.[2]

The amounts involved in the granting by P. & D. of the monthly rebates are substantial and reflect the importance which is attached to said rebates by the various purchasers, all of which will be set forth hereinafter in some detail. Rebates were granted by P. & D. and receifed by some but not all of the purchasers of the ignition line for the sample year 1950 on a total net purchases amount of approximately 90% of the gross sales of P. & D. These rebates were granted by P. & D. and received by approximately 600 purchasers in varying amounts, depending upon the monthly purchases of the individual accounts.[3] In the sample year selected (1950), many of the purchasers of P. & D. received no rebates whatsoever, and the majority of the purchasers received rebates in amounts less than 10% of the total net purchase price of the monthly purchases involved. The record in this case does not demonstrate that the purchasers receiving such rebates purchase in single transactions in as large or larger amounts than the great majority of purchasers who did not participate in the maximum amount of rebates offered and allowed under the P. & D. monthly rebate plan.

Fourth Proposed Finding:

P. & D. automative products and supplies sold and distributed in the manner described herein are commodities of but one like grade and quality.[4]

Purchasers of automotive products and supplies located in the same cities or towns and so purchasing P. & D. merchandise are competitively engaged each with the other in the resale of the same in such trade areas.[5] The trade area in which such purchasers are competitively engaged in the resale of P. & D. merchandise is usually not restricted to the city or town of their mutual location, but may and variously does further extend beyond such limits and into the sales territories of other purchasers also purchasing said merchandise for competitive resale.[1]

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[2] CX 46A-46E.

[3] CX 20.

[4] CX 1, 9; Tr. 386-387.

[5] Tr. 284, 297, 306, 336, 347, 363, 390-395.

Fifth Proposed Finding:

P. & D., in the course and conduct of its business, has been and is now marketing its products of like grade and quality through its P. & D. Franchise Distributors.[2]

The P. & D. Franchise Distributor purchases P. & D. ignition and fuel pump parts under the terms of P. & D. Franchise Distributor Agreements according to the prices shown on the Jobber Price List.[3] The Agreements, prepared and distributed by P. & D., provide for the maintenance of a complete stock of P. & D. parts.

P. & D. publishes and causes to be circulated to the above classification of accounts the catalog material and pertinent price lists including resale price lists. P. & D. representatives call upon all of the above accounts as a regular part of their duties for the purpose of inspecting stocks and drawing up orders for submission to P. & D. The Distributor accounts can and sometimes do redistribute P. & D. parts to approved P. & D. jobber accounts, but, in the main, purchase for resale to the classes of trade normally served by such jobber accounts, i.e., filling stations, garages, fleets, and specialty shops.

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[1] For example, Tr. 175-177 (12 salesmen cover Eastern Massachusetts); Tr. 284-285 (two to four salesmen cover a radius of 50 miles); Tr. 303, 304-306 (five salesmen covering two counties and parts of two other counties). See also Tr. 285, 322, 338, 347, 356 and 362.

[2] CX 15A, 17A.

[3] CX 15A, 17A, CX 10A, 11A, 13E, 14E.

Sixth Proposed Finding:

P. & D. BUYING/GROUP JOBBERS

Customers so classified purchase P. & D. products on the basis of the merchandise prices appearing on the current P. & D. Jobber Price List. The purchasing procedure in a group buying operation provides for the forwarding by the individual jobber-member to the seller directly or through the group office, the individual jobber's particular purchase requirements. Merchandise so ordered is shipped by the seller direct to the individual jobber-member with billing for the same being directed to the group 81 office. Monthly settlements are made between the seller and the group office for the aggregate purchase orders of all jobber-members so received and each jobber-member also settles monthly with the group office for its own individual purchases so made.

Such rebates, discounts and allowances as are collected from the seller by the group office on the aggregate purchases thus made are distributed by the group office to each individual jobber-purchaser in proportion to the amount of such jobber's individual purchases so made.[1]

During the sample year 1950, P & D. products were sold to various members of different group-buying organizations, entering into the P. & D. Distributor's Franchise Agreements. Sales were made during 1950 to members of the Six-State Associates of Boston, Massachusetts, and Warehouse Distributors, Inc., of Chattanooga, Tennessee.

The rebates and discounts, as shown by the tabulations in evidence were granted and allowed by P. & D. on the purchases of each individual member of the said buying-group irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of the P. & D. rebate schedules set forth in the P. & D. Rebate Agreements.[2] The record clearly illustrates the monetary benefits derived by the individual jobber-member of such group-buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases.[3]

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[1] CX 39A, 39B, 39C, 40, 41, 42A, 42B, 42C, 42D, 47 and 48.

It is clear from the foregoing testimony and exhibits of record in this proceeding that a group-buying organization is in reality but a bookkeeping device for the collection and distribution of rebates, discounts and allowances received from the sellers on the purchases made by its jobber-members. Jobber-members of a group-buying organization so purchasing merchandise from P. & D. are, therefore, "purchasers" from P. & D. within the meaning of the Clayton Act, as amended.[4]

Seventh Proposed Finding:

The net purchase price paid by purchasers for resale of P. & D. merchandise is the purchase price paid
82 subject to and following all applicable rebates, discounts and allowances. In the observance of the sellers suggested resale price the favorable competitive effect following a lower net purchase price as opposed to a higher net purchase price with relation to the higher profit margin thereby gained by the purchaser for resale, is self-evident.[1] Similarly, in the non-observance of the sellers

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[2] CX 47, 48; CX 15B, 15C, 17B

[3] CX 8.

[4] CX 43A, 43B, 43C; Tr. 148, 163-164, 170, 207.

[1] "Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, proximity to customers—all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on

suggested resale price, the ability of the purchaser for resale to offer for sale and sell at a lower price with a higher profit margin resulting from a lower net purchase price as opposed to a higher net purchase price, is beyond question.[2] The record, based on the tabulations in evidence in this proceeding, discloses substantial differences in net purchase prices paid by competing purchasers of P. & D. merchandise for resale far exceeding in amount the sum represented by the 2% cash discount extended and taken by these purchasers on such purchases. The substantiality of the amount represented by such price differences with relation to the purchaser's net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2% cash discount always taken on such purchases when available.[3] The importance of the net purchase price difference attributable to the rebates granted by P. & D. to pur-
82 chasers of automotive products and supplies is uni-
versally recognized by those purchasers who seek to purchase and do purchase the same through the use of a

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operating profit margin, a major factor in which, on this record, is cost of merchandise purchased." See Para. Eleven, Initial Decision of Hearing Examiner, Docket No. 5771, In the Matter of Namsco, Inc., adopted by the Commission as of March 17, 1953.

[2] See "III. Discounts to purchasers of by-products", opinion of United States Supreme Court, Corn Products Refining Company v. F.T.C. (1945) 324 U.S. 726.

[3] Tr. 312, 329, 344, 350, 359, 365. See in particular Tr. 166 where in response to the question as to why the jobber-witness takes advantage of the cash discounts offered, the following answer was given: "The amount that you are able to show as a profit which the company realizes is by availing yourself of the cash discounts. It is quite often the difference between a profit and a loss in any particular year." Particular reference in such connection is made to the following cases: Docket No. 3200, H. C. Brill Co., Inc., 26FTC 666 and F.T.C. v. Morton Salt Co., 334 U.S. 37.

group-buying organizational device.[1] P. & D., through recognition of such group-buying organizational device, also secured new and additional customers not previously purchasing P. & D. products.[2]

Eighth Proposed Finding:

P. & D.'s prohibited discriminatory pricing was not shown by the respondent to be excused or justified by any defense available to it under the provisions of Section 2, subsections (a) and (b) of the Clayton Act, as amended.[3]

CONCLUSIONS

1. P. & D. products purchased for resale are of like grade and quality.

2. P. & D.'s different rebates, discounts and allowances on purchase price result in a substantially higher net purchase price being paid by some than other competing purchasers of said products for resale.

3. P. & D.'s prohibited discriminatory price, when reflected in the resale price of said products, enables the favored purchaser to attract business away from the non-favored purchaser, or force the non-favored purchaser to resell at a substantially reduced profit. In the observance of a suggested resale price, the above prohibited discriminatory price enables the favored purchasers to resell said products at a substantially higher profit margin than that obtainable by the non-favored purchaser in such resale.[4]

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[1] Attention is invited to the arrangements made by P. & D. with the Six-States Associates Buying-Group. By use of the group device, each jobber-member increased his percentage of rebate to 20% as contrasted with the lesser rebate which was being granted by P. & D. prior to the formation of the buying group.

[2] Tr. 181; 135-136.

[3] See Tr. 292; 428.

[4] Section 2(a) is violated whether or not the seller's lower discriminatory price is reflected in the purchaser's resale price. See Corn Products Refining Co. v. F.T.C., 324 U. S. 726.

84 4. Competitive purchasers from P. & D. of the foregoing products for resale in their respective mutual sales territories are the P. & D. Distributors, P. & D. Jobbers and the P. & D. "Group-Buying Jobbers."[1]

5. The higher net purchase prices paid by the non-favored purchasers of said P. & D. products are such as may tend to and do injure, destroy, and prevent competition between the said favored and non-favored purchasers' competitive in their respective mutual sales territories.

PROPOSED ORDER[2]

It Is Ordered that respondent P. & D. Manufacturing Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

A. Discriminating, directly or indirectly, in the price of said automotive products and supplies of like grade and quality:

1. By selling to any purchaser at net prices higher than the net price charged any other purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

Wherefore, it is requested that the Hearing Examiner find that the respondent's above-described acts and practices are in violation of the provisions of subsection

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[1] See F.T.C. v. Ruberoid Co., (1952) 343 U.S. 470 at 475, with reference to the above descriptive terminology as applied by the seller to "purchasers who in fact compete."

[2] See F.T.C. v. Ruberoid Company, 343 U.S. 470 to the effect that the order need not be limited in its prohibitions to its specific price differentials shown to have been adopted in past violations of the status.

85 (a) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), and that the above proposed order to cease and desist be herein entered.

Respectfully submitted,
/s/ Eldon P. Schrup,
Eldon P. Schrup,
/s/ Francis C. Mayer
Francis C. Mayer,
Counsel Supporting the Complaint.

November 24, 1954.

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UNITED STATES OF AMERICA
Before Federal Trade Commission

• • (Caption—Docket No. 5913) • •

ORDER DISPOSING OF PROPOSED FINDINGS AND CONCLUSIONS.

This matter is before the Hearing Examiner for disposition of proposed findings of fact and conclusions which were filed by counsel for the respondent and counsel in support of the complaint. The Hearing Examiner has given consideration to the various proposed findings and conclusions submitted by counsel and the record herein and has made the following rulings with reference to such proposed findings and conclusions:

I.

Proposed Findings and Conclusions Filed by Counsel in Support of the Complaint

Proposed Findings 1-8: Adopted in substance.

Proposed Conclusions 1-5: These conclusions have been adopted in substance either in the conclusion to the initial decision or have been covered generally by the initial decision itself.

II.

Proposed Findings and Conclusions Submitted by Counsel for Respondent

Proposed Findings 1-6: Adopted in substance.

88 Proposed Finding 7: Adopted to the extent that respondent enters into franchise agreements with certain group buying organizations, but is rejected to the extent that rebates are granted on purchases made by the organization as distinguished from its members.

Proposed Finding 8: Adopted in substance.

Proposed Finding 9: Adopted in substance except that in its contracts the carburetor line is included in the ignition line for purposes of rebates. The detailing of the separate parts comprising the lines is not necessary to a finding in this proceeding.

Proposed Findings 10-12: Adopted to the extent that the allegations of the complaint are covered generally in the initial decision and the detailing of the charges are not necessary to the initial decision.

Proposed Finding 13: Issues set out in this proposed finding have been adopted in the initial decision.

Proposed Finding 14: Rejected.

Proposed Finding 15: Adopted to the extent that the group buying procedure as outlined is covered generally in the initial decision.

Proposed Finding 16: Adopted in substance.

Proposed Finding 17: Rejected, as both Shapiro and Dawes Auto purchased in the sample year 1950.

Proposed Finding 18: Rejected. Tabulation re: Stull and Penn based upon actual amount deducted as related to net price after deducting freight and allowances as reflected by respondent's books and records. Testimony is that parties take a 2 percent discount generally,—but there is no dispute that the parties named received the higher discount from respondent in lieu of cash discount.

Proposed Finding 19: Rejected as not material in view of other testimony by this witness.

Proposed Findings 20-25: Rejected as not material.

Proposed Findings 26-30: These proposed findings are more or less argumentative and the legal questions raised have been disposed of in the initial decision.

89 Proposed Finding 31: Rejected as being contrary to the facts in this proceeding.

Proposed Finding 32-33: Adopted.

Proposed Finding 34-35: Rejected.

Proposed Conclusion: Rejected.

/s/ Earl J. Kolb,
Earl J. Kolb,
Hearing Examiner.

December 20, 1954.

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UNITED STATES OF AMERICA
Before Federal Trade Commission

Stamp—Federal Trade Commission Received Dec. 2, 1954
Records Serve Secretary R.M.P.

* * (Caption—Docket No. 5913) * *

INITIAL DECISION

By

Earl J. Kolb,
Hearing Examiner.

This proceeding is before the undersigned Hearing Examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

The complaint in this proceeding was issued August 9, 1951, charging the respondent, P. & D. Manufacturing

Co., Inc., a corporation, with having violated the provisions of subsection (a) of Section 2 of the Clayton Act as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Webster Ballinger, a duly designated hearing examiner of the Commission. At the close of the testimony in support of the complaint the respondent made a motion to dismiss the complaint for failure to establish a prima facie case, which motion was denied by the hearing examiner, Webster Ballinger, on the record on April 5, 1954. It then appearing that said Hearing Examiner Webster Ballinger would become unavailable to the Commission by reason of his retirement from Government service on May 31, 1954, counsel for the respondent advised that he would not be in a position to complete the respondent's defense within that time and agreed to the appointment of a substitute hearing examiner to go forward with the case and 91 hear the full defense offered by the respondent and make a decision on the whole record just as though he had heard the whole case. Subsequent thereto, on April 12, 1954, the Commission issued its order designating Earl J. Kolb as Hearing Examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Webster Ballinger. Thereafter, counsel for respondent made certain motions before the undersigned Hearing Examiner renewing his motions to dismiss and to strike certain testimony. These motions having been denied, the case for the respondent was closed without the introduction of any testimony in opposition to the charges of the complaint.

The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers is not disputed by the respondent, but instead the respondent relied upon the contention that counsel in support of the complaint had failed to establish the violation of law alleged in the complaint by reliable, probative and substantial evidence. Evidence in this proceeding, with reference to the charges of the complaint as to primary line injury to competition between respondent and its competitors and tertiary line injury to competition between customers of respondent's purchasers, is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury between competing customers of the respondent. Consequently, the issues to be determined in this proceeding are reduced to the following:

(a) Does the record contain reliable, probative and substantial evidence that respondent's pricing plan constitutes discriminations in price between competing purchasers of its automotive products of like grade and quality?

(b) Does the record contain reliable, probative and substantial evidence that the effect of respondent's pricing plan may be substantially to lessen, injure, destroy, or prevent competition between competing purchasers from the respondent?

FINDINGS AS TO THE FACTS

1. Respondent P. & D. Manufacturing Co., Inc., is a corporation organized under the laws of the State of 92 New York with its principal office and place of business located at 19-02 Steinway Street, Long Island 5, New York.

2. Respondent is now and for several years last past has been engaged in the business of the manufacture, sale and distribution of automotive products and supplies, principally ignition parts, fuel pump parts, carburetor parts and other related items, in interstate commerce in competition with other concerns who were also engaged

in the sale and distribution of similar products in interstate commerce.

3. In the course and conduct of its business the respondent has been and is now marketing its automotive products of like grade and quality under its own brand name throughout the United States, maintaining warehouse space in the Cities of Los Angeles, California; Kansas City, Missouri; Chicago, Illinois; Atlanta, Georgia; and Dallas, Texas. In offering its products for sale respondent classifies its products generally into two lines —ignition line, including carburetor kits and parts, and fuel pump line and related items. At all times since 1936 respondent has offered and sold an ignition line to its purchasers, adding the fuel pump line in 1950.

4. The respondent, during the time mentioned herein, has sold its products to jobbers who were designated by the respondent as distributors who resold such products to garages, service stations, fleet owners and other jobbers. From time to time respondent issued its jobbers price list on each of these lines which listed the basic prices used by respondent in the sale and distribution of its various automotive parts. Any discounts, allowances or rebates were off said jobbers price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products.

5. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive products sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of respondent's automotive products in the various ter-

93 ritories and places where such distributors carried on their businesses.

6. Respondent's pricing plan involved the granting of monthly volume rebates which were incorporated in and made a part of its various distributors franchise and rebate agreements. During the year 1950, respondent distributed its automotive products on the basis of applicable jobbers price lists subject to rebates or discounts provided for in franchise and rebate agreements with its distributors and other customers. The Distributor's Rebate Agreements used by respondent in connection with the sale of its ignition line provided for the following monthly rebates in lieu of the usual 2 percent cash discount granted all its customers:

Net Purchases during each month	Monthly rebate
$100 to $149	5%
150 to 199	7%
200 to 299	10%
300 to 399	13%
400 and over	15%

The Distributor's Fuel Pump Rebate Agreement used by respondent in connection with the sale of fuel pumps provided for the following monthly rebates in addition to the usual 2 percent cash discount:

Net Purchases during each month	Monthly rebate
$ 0 to $199	10%
200 and over	15%

Under the above rebate plans, purchasers were granted and received rebates applicable to their total monthly purchases, differing in amounts according to the total of their monthly purchases.

7. In the sale of both of the above described lines, re-

spondent further entered into Distributors Franchise Agreements on its ignition line and Distributor's Fuel Pumps Franchise Agreements on its fuel pump line with some of its customers providing for cash discounts of
94 20 percent and 2 percent on all purchases without regard to, or any limitation upon, the size of the monthly purchases of the franchise distributors. This agreement further provided that the distributor must sell more than 80 percent at wholesale and maintain a complete stock of respondent's parts.

8. As a result of its sales of ignition line, respondent offered its customers eight different buying prices ranging from sales upon which no monthly rebate was granted but only the 2 percent cash discount allowed, to the 20 percent and 2 percent cash discount granted to the franchise distributors, irrespective of the distributor's monthly volume of purchases. In the sale of its fuel pump line respondent granted its purchasers four different buying prices ranging from its jobber's list price without any rebate but subject to the 2 percent cash discount for prompt payment, to the 20 percent monthly rebate, plus 2 percent cash discount, allowed to its franchise distributors, regardless of the total monthly purchases of those customers.

9. During the year 1950 respondent sold its automotive products to approximately 700 accounts with total domestic sales of approximately $1,685,059.00. In the ignition line the sales were distributed on the basis of rebates and discounts as follows: 60 jobbers purchasing $8,364.00 received the 2 percent cash discount; 258 jobbers, purchasing $299,417.00 received rebate of 5 percent to 7 percent; 92 jobbers, purchasing $134,619.00, received a rebate of 10 percent; 86 jobbers, purchasing $168,570.00, received a rebate of 15 percent; and 186 jobbers, purchasing $1,054,638.00, received 20 percent, plus 2 percent

cash discount. As to the fuel pump customers, there were 56 jobbers who purchased $119,451.00 who received 10 percent to 15 percent, plus 2 percent cash discount.

10. During the year 1950, respondent sold its products to jobber manufacturers of two group buying organizations—Six-State Associates, Boston, Massachusetts, and Warehouse Distributors, Inc., Chattanooga, Tennessee—who entered into franchise agreements with respondent as distributors.

11. The purchase procedure in a group buying operation provided for the forwarding of purchase orders by the individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual
95 jobber member with billing for same being directed
to the group office. Monthly settlements were made between the respondent and the group office for the aggregate purchase orders of all the jobber members so received, and each jobber member also settles monthly with the group office for his own individual purchases so made. Such rebates, discounts and allowances as are collected from the seller by the group office on the aggregate of the purchases thus made are distributed by the group office to each individual jobber purchaser in proportion to the amount of such individual jobber's purchases so made. The rebates and discounts as shown by the tabulations in evidence were granted and allowed by respondent on the purchases of each individual member of said buying group irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's rebate schedules set forth in respondent's rebate agreements. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made

by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

12. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's automotive parts to dealers and other purchasers in their respective trade areas. The price discriminations received by some distributors as compared with others competing with them in the same trade area as the result of respondent's pricing plan is shown by a number of tabulations taken from respondent's books and records which were received in evidence as Commission's Exhibits 46 through 48. These tabulations show the 96 prices paid and the rebates received by purchasers located in various trade areas throughout the United States during the year 1950. For example, testimony was taken of distributors who were in competition with each other in the sale of respondent's products in the trade area which includes the Cities of Scranton, Wilkes-Barre and Kingston, Pennsylvania. The amounts purchased by the

distributors in this area and the rebates and discounts received by them on both the ignition line and the fuel pump line are as follows:

IGNITION LINE:

Name of Purchaser	Net Purchases	Amount of Rebate	Percentage of Rebate
Ackerson-Weinberg Co.	$ 107.14	$ 2.19	2.04%
Daves Auto Parts	208.66	0	0
Charles B. Scott Co.	2.77	.06	2.17%
Hy-Grade Tire Supply	511.92	51.21	10.00%
N. & W. Auto Parts and Associates	559.59	81.66	14.59%
Penn Auto Parts Co.	804.91	119.05	14.79%
Sterling Auto Supply	1,508.00	146.55	9.72%
Shapiro Auto Supply Co.	149.47	21.74	14.55%
Kitsee Auto Store	2,021.08	241.76	11.96%
Stull Brothers	3,219.56	476.77	14.81%

FUEL PUMP LINE:

Name of Purchaser	Net Purchases	Amount of Rebate	Percentage of Rebate
Daves Auto Parts	$ 48.59	$ 0	0
N. & W. Auto Parts and Associates	198.96	32.14	16.15%
Shapiro Auto Supply Co.	49.27	11.96	24.27%
Blackman Auto Parts Co.	294.89	45.03	15.27%

There is nothing in the record to indicate that the above trading area is unique or different from other trading areas where respondent sells its automotive parts 97 at differing prices. It is, therefore, concluded that competitive conditions shown to exist in this area with respect to the purchase and resale of respondent's automotive parts is typical and representative of the other areas of the United States and that respondent's distributors reselling respondent's products in the same trading area are in competition with each other in the resale of such products.

13. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for resale. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses, and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. By the very nature of the busine[illegible] operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled from 40 to 300 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they receive to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

14. In the testimony of at least one witness it was indicated that the jobber is not too concerned about differing prices among competitors for the reason that all sell at the suggested resale price in his territory. The fact that price competition may have been eliminated in some areas because of uniformity of resale prices does not eliminate the question of injury to competition. Any sav-

ing or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and
98 more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists.

15. It was also contended by the respondent that the automotive parts sold by it to competing customers have not been shown to be of like grade and quality, and as a basis for this contention respondent has taken the position that such parts to be of like grade and quality, under Section 2(a) of the Clayton Act, must pass the test of interchangeability. This would, in effect, be saying that merchandise to be of like grade and quality must be identical. If Congress had intended to so require, it would have said so. We do not have here different grades of merchandise designed to sell at different price levels, such as first quality line and second or inferior quality line. All of respondent's products are of the same grade and quality.

16. Respondent's distributors purchased respondent's automotive parts not as individual items, but as part of a line designed to supply the needs of garages and others engaged in the repair of motor vehicles. The respondent has grouped its automotive parts for discount purposes into two separate categories which are referred to as respondent's ignition line and fuel pump line. As each of these lines carries a separate and different monthly volume rebate, respondent has made the selection of the parts to go into the various lines and the rebates granted

to purchasers of such lines apply to each and every item in the line. Having grouped its parts for discount purposes, the respondent cannot logically contend that items within the group are not of like grade and quality or that distributors in the same trade area, who purchase items within the group for resale, are not in competition.

17. The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. Respondent's contention of interchangeability places the existence of like grade and quality solely on functional similarity and thereby ignores the effect of competitive opportunity. When the respondent sells automotive parts classified into the two lines described above to its distributors who resell in competition with each other in their respective trade areas, the functional similarity
99 of the individual items in each class is no longer of consequence because from a competitive standpoint they are all of like grade and quality. Distributors in order to supply the needs of their garage and other customers would purchase substantially all of the items in respondent's various lines over a period of time, their purchases of the items being dependent upon the demands of their customers. It must accordingly be concluded that the discriminations in price herein found were, in fact, made in connection with the sale and distribution of merchandise of like grade and quality and that the defense that such products must pass the test of interchangeability is without merit.

CONCLUSIONS

The aforesaid discriminations in price by respondent, as herein found, constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It Is Ordered that the respondent P. & D. Manufacturing Co., Inc., and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating directly or indirectly in the price of said automotive products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price, in the resale and distribution of respondent's products.

/s/ Earl J. Kolb,
Earl J. Kolb,
Hearing Examiner.

December 20, 1954.

100

UNITED STATES OF AMERICA
Before Federal Trade Commission

Stamp—Received
Jan 17 1955

* * (Caption—Docket No. 5913) * *

NOTICE OF INTENTION TO APPEAL FROM INITIAL DECISION.

Please take notice that the respondent P. & D. Manufacturing Co., Inc., intends to appeal from the initial decision of the Hearing Examiner filed with the Commission on December 20, 1954, and first notification of which was received by counsel for respondent by ordinary mail on January 7, 1955.

P. & D. Manufacturing Co., Inc.
Respondent
By /s/ James W. Cassedy
Attorney for respondent.

James W. Cassedy
Halfpenny, Hahn & Cassedy
1001 Connecticut Avenue, N. W.
Washington 6, D.C.
January 14, 1955

101-196 * * *

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UNITED STATES OF AMERICA
Before Federal Trade Commission

* * (Caption—Docket No. 5913) * *

MEMORANDUM REPLY BRIEF TO RESPONDENT'S SUPPLEMENTAL APPEAL BRIEF FOLLOWING ORAL ARGUMENT.

Counsel supporting the complaint submit that a proper appraisement of the factual findings and conclusions of the initial decision in this as in the preceding companion auto parts case must rest on the acceptance or the rejection of the validity of the Hearing Examiner's evaluation of the record testimony.

In this regard it appears beyond argument that a fair and reasonable evaluation by the Hearing Examiner of the record testimony would require that he be not limited to consideration of only unsupported opinion evidence or the partial testimony of any witness, but that such consideration must and should be extended to include all the credible facts of known common acceptance which are elicited from the witness during the entire course of both the direct and the cross examination.[1]

This is exactly what was done in this as in the preceding companion cases and no case cited in respondent's supplemental brief refutes this course of action. Respondent's specious argument as contained in its supplemental brief would appear to be supported by only the dissenting opinion and the appendix thereto filed in the preceding Moog matter (D. 5723), which dealt solely with the inconclusive partial testimony of certain witnesses
198 as given on direct examination and patently ignored the balance of the testimony obtained during the course of the cross-examination. It is worthy of note in this connection that the then chairman of this Commission in his concurring opinion in the Moog matter stated as follows:

> "The record contains direct and substantial evidence showing probability of injury to competition in the secondary line, namely, in the distribution of automotive parts through jobbers and dealers. For this reason I concur in the majority opinion."

The record testimony in this as in the Moog matter being to the same effect, it would correspondingly appear clear that respondent's appeal from the initial decision in this matter should likewise be denied.

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[1] As stated in the Commission's opinion in D. 5675, General Food Corporation:

> "He had opportunity to observe the witnesses both on direct and cross-examination and his findings are to be given proper weight. Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474; Folds v. Federal Trade Commission (1951) 187 F. 2d, 658."

Respectfully submitted,
/s/ Eldon P. Schrup
Eldon P. Schrup
/s/ Francis C. Mayer
Francis C. Mayer,
Counsel Supporting Complaint.

Approved:
Robert R. MacIver,
Assistant Director,
Bureau of Litigation.
Joseph E. Sheehy,
Director
Bureau of Litigation.

(Mailed Feb 28 1956—Legal Records)

199

UNITED STATES OF AMERICA

Before Federal Trade Commission

(Caption—Docket No. 5913)

Commissioners:
John W. Gwynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

FINAL ORDER.

Respondent P. & D. Manufacturing Co., Inc., having filed on March 7, 1955, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusion and order contained in the initial decision:

It Is Ordered that respondent P. & D. Manufacturing Co., Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

By the Commssion, Commissioner Kern not participating, and Commissioner Mason dissenting.

/s/ Robert M. Parrish
Robert M. Parrish,
Secretary

RTS
Issued: April 26, 1956
J.W.G.G.A.

200

UNITED STATES OF AMERICA
Before Federal Trade Commissicn
* * (Caption—Docket No. 5913) * *

Commissioners:
John W. Gwynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

OPINION OF THE COMMISSION.

By Anderson, Commissioner

Complaint was issued in this matter on August 9, 1951, charging respondent, P. & D. Manufacturing Co., Inc., of Long Island City, New York, with having discriminated in price in connection with its sale of ignition and fuel pump lines of automotive replacement parts to competing purchasers in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act [15 U.S.C.A., Sec. 13].

After introduction of testimony and other evidence in support of the complaint, respondent moved to dismiss on the ground that a prima facie case had not been established. This was denied by the Hearing Examiner. Subsequent thereto, the Hearing Examiner became unavailable for further participation in the proceedings. Thereafter another Hearing Examiner was substituted by agreement of counsel. The motion to dismiss the complaint was renewed and other motions were made by respondent to strike certain testimony. These were denied. Thereafter, except for two exhibits, (1) a debit memorandum, and (2) a copy of its motion to dismiss, respondent failed to introduce testimony or other evidence in opposition to the allegations in the complaint or in justification of the 201 differing prices charged their competing customers which had been placed in the record by counsel supporting the complaint. On December 20, 1954, the Hearing Examiner issued his initial decision upholding the position of counsel supporting the complaint.

The matter is now before the Commission on respondent's appeal from the Hearing Examiner's initial decision. The initial decision includes seventeen numbered paragraphs of findings as to the facts; a conclusion that the discriminations found constitute violations of Sec. 2(a) of the Clayton Act, as amended by the Robinson-Patman Act; and an order that respondent cease and desist from discriminating in price:

> "By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the

higher price, in the resale and distribution of respondent's products.''

In the respondent's appeal, exceptions have been taken as follows: (1) to the Hearing Examiner's findings in paragraphs 5, 8, 9, 12, 13, 14, 15, 16 and 17 of the initial decision; (2) to the Hearing Examiner's conclusions of law; (3) to the failure of the Hearing Examiner to make certain findings and conclusions; (4) to procedural rulings of the Hearing Examiner (a) on the admission of evidence, (b) on the motions to dismiss, and (c) denying a motion to require counsel in support of the complaint to make certain elections and specifications from the evidence; and (5) to the substance, form and constitutionality of the proposed order to cease and desist.

Although the complaint alleged injury to competition in other lines of commerce, we are of the opinion that the Hearing Examiner was correct in his initial decision in findng that the evidence of record limits consideration to that of injury in the secondary line of commerce between distributors and jobbers who are customers of respondent.

The following questions are raised by the respondent's exceptions to the rulings of the Hearing Examiner and the appeal taken from the initial decision:

202 1. Did the Hearing Examiner err in his procedural rulings?

2. Is there reliable, substantial and probative evidence that (a) there were price differentials to (b) competing customers in their purchase of (c) commodities of like grade and quality?

3. If there were price differentials to competing customers on their purchases of commodities of like grade and quality, is there reliable, probative and substantial evidence that the effect of these may be

substantially to lessen competition between such competing purchasers?

4. Is the proposed order in the initial decision, in form and substance, in compliance with the standards of definiteness and reasonableness required by due process of law under the Fifth Amendment to the Constitution?

These questions were all raised and decided in the matter of Moog Industries, Inc. (Docket No. 5723), a companion case, in which the Commission issued its order to cease and desist on April 29, 1955, and which is now pending on appeal in the Court of Appeals for the Eighth Circuit. The pattern of pricing and the character of the evidence presented by the record in the Moog case were substantially the same as in this matter.

The rulings of the Hearing Examiner in admitting Commission's Exhibits 46-A through 48 were not prejudicial error. These are tabulations which were prepared by the accounting staff of the Commission. The preparation of these tabulations was in connection with a two months' study and examination at respondent's offices of the customers' debit and credit memoranda, invoices, cash books, sales journals and freight bills for the year 1950. From these books and records of respondent, tabulations were made of (1) the names and locations of customers in numerous trading areas, (2) each of such customer's total billing, parcel post and insurance, freight allowances, net items, total sales subject to rebate and discount, (3) the separate total purchases by each of said customers of the ignition and fuel pump lines with separately itemized amounts and percentages of rebates and discounts
203 allowed, and (4) the combined total rebates and discounts allowed each of them.

Respondent does not challenge the accuracy of these tabulations. Respondent's objections are that (1) the tabulations do not reflect differing prices on purchases of commodities of like grade and quality, rejecting the arguments of counsel supporting the complaint that separate designation and tabulation of the two lines, ignition and fuel pump, satisfy this requirement, (2) that since individual items within a line are not comparatively designated, respondent is not able to present defense testimony and evidence, and is, therefore, denied due process of law, and (3) that the tabulations do not prove the existence of competition between the customers listed.

The tabulations were not offered to show competition. They were offered to illustrate the pricing pattern of respondent in the sale of the two lines to different customers in a number of trading areas throughout the United States.

Respondent grouped its individual automotive replacement parts into two categories, the ignition line and the fuel pump line. Arrangements for distributorships were provided in the "Distributors Fuel Pumps Franchise Agreement" and the "Distributor's Fuel Pump Rebate Agreement"; and, as to the ignition line, "Distributor's Rebate Agreement" and "Jobbers Contract." Terms of sale including discounts and rebates are set out in the agreement and apply to the line involved in the contract.

Respondent's salesmen check the inventory of the distributors and jobbers in making their rounds and present the list of deficiencies to the customer from which a single order is made for a number of varied items within the line purchased. William O. Nickel, Manager of The Kitsee Auto Store, Wilkes Barre, Pennsylvania, testified as follows:

> "A. We make up this order, these sizes, for a couple of reasons. The first reason, there might be

times we might order something we might need in a hurry, something that we can't wait for. In the lines that we carry with P & D, I made a recount here recently. We found that there are 507 items in the P & D line that we attempt to carry.

204 "The P & D people have representatives out. Those men are out not to get orders as much as to be of service to us. We don't have the time to check over our complete inventory personally, so we depend on the road man to check the inventory for us as an accommodation. When he gets through, he had a recap, so naturally, when you go through 507 items, you are bound to come up with an order that exceeds better than $100. The only time when we will order anything less than that—and that's a very rare case—is when we don't have the time to go through this whole inventory. * * *"

Invoices are submitted on single purchase orders of a number of individual items within the line involved. At the end of the month, total purchases in each line are separately figured to determine the total monthly discounts or rebates due to individual purchasers.

Thus it is clear that respondent sells and prices its automotive parts in two lines. There is a single grade and quality of each item in each line. Respondent's customers do not necessarily purchase all of the items at one time, but in order to meet the demands of the trade they carry the line or lines involved.

Respondent has sought to have the Commission adopt the theory of interchangeability, i.e., that the only way "commodities of like grade and quality" may be shown for the purposes of the act is that the identical individual items in each of these lines be segregated and separately considered in connection with their sale to different customers. We find that respondent has prevented any practical application of this test through its method of selling, invoicing, pricing and receiving payment through the grouping of the two categories, ignition and fuel pump parts. We do not find here different grades of merchandise designed to sell at different price levels, such as first quality line and second or inferior quality line. All of respondent's products are of the same grade and quality.

The conclusion is, therefore, inescapable that respondent's sales of the ignition line to two distributors who resell the lines in the same trading area are sales of "commodities of like grade and quality" within the meaning of Sec. 2(a) of the Clayton Act, as amended. The
205 Commission so found as to the similar practice of grouping automotive parts by lines in the Moog case.

We are of the opinion that Commission's Exhibits 46-A through 48 are tabulations showing differing net prices to customers in a number of respective trading areas on their purchases of commodities of like grade and quality.

Any difficulties of presenting respondent's defense to the facts presented in Commission's Exhibits 46-A through 48 are the results of respondent's method of offering for sale, selling and pricing its products by lines. These difficulties are not increased by the method of presenting the facts in tabular form in lieu of the heavy volume of source materials from respondent's files. Respondent has not, as contended, been denied due process of law by admission of these documents to the record.

The Hearing Examiner did not err in overruling respondent's motions to dismiss the complaint on the ground that counsel supporting the complaint had not established a prima facie case. The points raised in these motions are substantially the same as those we consider here on appeal.

The Hearing Examiner was correct in his denial of the motion of respondent that counsel supporting the complaint elect and specify certain evidence from the record relied upon to show respondent's violations of the statute. Respondent contended that counsel supporting the complaint had, by placing voluminous documentary evidence in the record, including the 1950 tabulations of price differences to customers in a number of trade areas, placed an insurmountable burden of analysis and proof upon them by requiring a breakdown of thousands of invoices and cost allocations.

We were faced with exceptions by respondent in the Moog matter to similar rulings by the Hearing Examiner in denial of a similar motion. There, as here, tabulations of price differences to different customers in a number of trading areas on lines of automotive replacement parts, based on respondent's records, were placed in the record. We find no different facts which would support a different ruling here. Respondent was fully apprised of the issues herein and counsel supporting the complaint has included tabulations, the nature of which, in our opinion, is responsive to the respondent's method of doing business.

206 The respondent had a fair and impartial hearing.

In disposing of respondent's exceptions to procedural rulings by the Hearing Examiner, we have found that respondent sold its commodities of like grade and quality to different customers in a number of trading areas throughout the country. Respondent contends that there is no evidence in the record that the different prices were to competing customers.

Respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas. We find these distributors were, in fact, in competition with each other and in competition with group-buying jobbers in their respective trade areas.

Seven automotive parts jobbers who sell respondent's automotive parts in the general trading area of Scranton and Wilkes Barre, Pennsylvania, testified at the call of counsel supporting the complaint. One of the seven, Selig Shapiro, a partner in Shapiro Auto Supply, Wilkes Barre, Pennsylvania, testified in part as follows:

> "Q. In what general area do you offer your products for sale?
>
> "A. Our men cover a radius of approximately fifty miles, but we confine most of our efforts to the Wilkes Barre general trading area.
>
> "Q. With what other type of automotive businesses do you compete in the resale of your products?
>
> * * * * *
>
> "A. Any business that would be in the wholesaling of parts, accessories or equipments.
>
> "Q. Would you name for me by name several of the companies in your area?
>
> "A. Yes. We compete with Stull Brothers of Kingston; Kitsee Auto Stores of Wilkes Barre, Franconi Auto Supply of Kingston; K & K of Wilkes barre and Scranton; Klein Auto of Wilkes Barre. I think I just about covered the field.
>
> "Q. To what class of customers do you offer your products for sale?
>
> 207 "A. Well, we wholesale to garages, car dealers, gas stations, and we also cover some sub-jobbers.
>
> "Q. Did you purchase any products for resale during the year 1950 from the P & D Manufacturing Company of New York?
>
> "A. Yes, sir, I did."

Mr. Shapiro purchased both lines of automotive parts from respondent.

Two of those named by Mr. Shapiro as competitors testified. Howard A. Stull, partner in Stull Brothers, testified that his company competes in the same areas for customers' business, having a radius of about 50 miles from Kingston, Pennsylvania, which includes Wilkes Barre, Pennsylvania;[1] and that he purchased the P. & D. ignition line in 1950.

The second competitor named who testified was William O. Nickel, manager of The Kitsee Auto Stores, Wilkes Barre, Pennsylvania. He testified in part as follows:

> "Q. In what general area do you offer your goods for sale?
>
> "A. We cover Luzerne County, Wyoming County, part of Wyoming, part of Columbia.
>
> * * * * *
>
> "Hearing Examiner Ballinger: Will you state what companies are selling in the same area that you are selling in—that is, comparable products.
>
> "The Witness: Any jobber, you can go through the list. You can pick up any jobber. They all handle ignition parts. Everybody handles ignition parts. * * * You can name all—Klein, K & K Franconi Auto Parts; you can name Stull Brothers; you can name Rudolph Auto Electric; Ritter Electric; you can name Penn Parts; you can name Shapiro. They are competitors, but we don't recognize them as too big of a competitor. Kingston Auto Parts. That covers the majority of them.
>
> * * * * *
>
> 208 "Q. Mr. Nickel, to what class of trade do you offer your automotive products for sale?
>
> "A. We offer our merchandise to gas stations, garages, car dealers * * *.

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[1] This would also include Scranton, Pennsylvania, which is shown by the Rand McNally road map to be about 20 miles to the northeast of Kingston.

> "Q. What products of the respondent P & D did you purchase for resale during 1950?
>
> "A. We purchased * * * ignition parts * * *."

The other witnesses from the Scranton area testified likewise.[2]

The words "competitor" and "competition" have been judicially defined within the meaning of the Robinson-Patman Price Discrimination Act. In Russelville Canning Company v. American Can Company, 87 F. Supp. 484, the court held that where plaintiff and another buyer of defendant's cans did not pack the identical products, but they both canned packed vegetables, sold them in the same markets, and products of both of them often appeared on the same shelf in the same grocery store, they were "competitors" within the meaning of the statute. The court further held that competition is the effort of two or more parties, acting independently to secure the business of a third person by the offer of the most favorable terms. See also Simmons v. Johnson, 11 So. 2d 710; Silbert v. Kerstein, 62 N.E. 2d, 109; Shill v. Remington Putman Book Co., 17 A. 2d 175; Stockton Dry Goods Co. v. Girsh, 221 F. 2d 186; Ferd Heim Brewing Co. v. Belinder, 71 S.W. 691; United States v. American Linseed Oil Co., 262 U.S. 371 ("* * the play of contending forces ordinarily engendered by an honest desire for gain."); and Lipson v. Socony Vacuum Corporation, 87 F. 2d 265.

The tabulations prepared for 1950 list the details of the purchases of the aforementioned witnesses and others from the Scranton area showing varying net prices on their purchases from P. & D. of "commodities of like grade and quality."[3]

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[2] Allen G. Smith, Sterling Auto Supply, Scranton, Pa. (Tr. 339, 340); Jesse Levy, Hi-Grade Auto and Supply Company, Scranton, Pa. (Tr. 347, 348); Sol Goosay, Penn Auto Parts, Scranton, Pa. (Tr. 355, 356); and David Rubin, Daves Auto Parts (Tr. 362, 363).

209 We therefore find that there is reliable, probative and substantial evidence that respondent sold commodities of like grade and quality at different net prices to competing customers.

Is there reliable, probative and substantial evidence that the effect of these may be substantially to lessen competition between such competing customers?

The differing net purchase prices in the two lines of automotive parts resulted from the application by respondent of its monthly rebate volume discount schedules to the net purchase prices of such products. On the ignition line, the following monthly rebates were granted in lieu of the usual 2 percent discount for payment within ten days granted all customers:

Net Purchases During Each Month	Monthly Rebate
$100 to $149	5%
150 to 199	7%
200 to 299	10%
300 to 399	13%
400 and over	15%

On the fuel pump line the following monthly rebates in addition to the usual 2 percent cash discount resulted in different net purchase prices to competing customers of respondent:

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[3] CX 46-C (Stull Brothers, Kingston, Pa.); CX 46-D (Daves Auto Parts, Ackerson-Weinberg Company, Chas. B. Scott Co., Hi-Grade Auto Parts & Accessories, Penn Auto Parts Co., and Sterling Auto Supply, all from Scranton, Pa.; and Shapiro Auto Supply Company, Kitsee Auto Store, and Blackman Auto Parts Co., all of Wilkes Barre, Pa.).

Net Purchases During Each Month	Monthly Rebate
$ 0 to $199	10%
200 and over	15%

Respondent has agreed to and does grant some of its customers discounts of 20 percent and 2 percent cash on all purchases without limitation or regard for the size of their monthly purchases. Those customers who receive this rate of discount agree to handle a complete stock of P. & D. automotive parts and must sell at least 80 percent of their products as wholesalers.

210 This method of pricing reflected respondent's offer of eight different net purchase prices of its ignition line, ranging from no monthly rebate but only the 2 percent cash discount, to the 15 percent monthly rebate based on the various sizes of total monthly purchases, and from there to the 20 percent and 2 percent cash discount to its franchised distributors without regard to the size of their purchases. In the fuel pump line, four different buying prices were offered, ranging from the jobber's price list without rebate but subject to the 2 percent cash discount for payment within 10 days, to the 15 percent monthly rebate depending on the size of the total monthly purchases, and from there to the 20 percent monthly rebate, plus 2 percent cash discount, to its franchised distributors on all purchases irrespective of the total amounts involved in same.

Regardless of the dollar amount, size, or the number of individual purchase transactions of a customer, the discounts or rebates granted by respondent are based upon the total aggregate dollar amount of that customer's monthly purchases.

Respondent also entered into agreements with group-buying organizations through which jobber members

211 of the organizations individually purchased the two lines of automotive parts and through which each received higher discount rates than would normally apply to their separate monthly purchase volumes. This was accomplished by applying the volume discount rate to the aggregate volume of all the individual purchases of the members of the group. During the sample year chosen, 1950, there were two such group-buying organizations—Six State Associates, Boston, Massachusetts, and Warehouse Distributors, Inc., Chattanooga, Tennessee, who participated on behalf of their members in purchases of respondent's lines of automotive parts under this plan.

The group-buyer arrangements were no more than bookkeeping devices for the collection of rebates and discounts received by the jobber members of the group on their individual purchases. The result was that some of such purchasers received a more favorable price or higher rebate than other competing purchasers outside of the group.

With a total business in 1950 of approximately $1,685,059 and approximately 700 accounts, respondent granted its rebates and discounts under this method of pricing as follows: 60 jobbers purchasing $8,364.00 received the 2 percent cash discount; 258 jobbers, purchasing $299,417.00 received rebate of 5 percent to 7 percent; 92 jobbers, purchasing $134,619.00, received a rebate of 10 percent; 86 jobbers, purchasing $168,570.00, received a rebate of 15 percent; and 186 jobbers, purchasing $1,054,638.00, received 20 percent, plus 2 percent cash discounts. As to the fuel pump customers, there were 56 jobbers who purchased $19,451.00 who received 10 percent to 15 percent, plus 2 percent cash discount.

The following details illustrate the results of respondent's pricing method in 1950 in the trade area which includes the cities of Scranton, Wilkes Barre, and Kingston, Pennsylvania, in which testimony was taken of distributors who were in competition with each other:

212 Ignition Line:

Names of purchaser	Net Purchases	Amount of Rebate	Percentage of Rebate
Ackerson-Weinberg Co.	$ 107.14	$ 2.19	2.04%
Daves Auto Parts	208.66	0	0
Charles B. Scott Co.	2.77	.06	2.17%
Hy-Grade Tire Supply	511.92	51.21	10.00%
N. & W. Auto Parts and Associates	559.59	81.66	14.59%
Penn Auto Parts Co.	804.91	119.05	14.79%
Sterling Auto Supply	1,508.00	146.55	9.72%
Shapiro Auto Supply Co.	149.47	21.74	14.55%
Kitsee Auto Store	2,021.08	241.76	11.96%
Stull Brothers	3,219.56	476.77	14.81%

Full Pump Line:

Names of purchaser	Net Purchases	Amount of Rebate	Percentage of Rebate
Daves Auto Parts	$ 48.59	0	0
N. & W. Auto Parts and Associates	198.96	32.14	16.15%
Shapiro Auto Supply Co.	49.27	11.96	24.27%
Blackman Auto Parts Co.	294.89	45.03	15.27%

There is no reason of record from which it may be inferred that the Scranton-Wilkes Barre-Kingston, Pennsylvania, trading area is unique or different from other trading areas which are listed in the tabulations which set out the details of varying net prices granted by respondent in its sale of the two automotive parts lines in 1950. We therefore conclude that the competitive conditions which are shown in the above table to exist in that area are typical of those throughout the country with respect to the purchase and resale of respondent's automotive parts.

213 The significance of the substantial differences in net net purchase prices offered and granted by respondent to competing customers on their purchases of its lines of automotive parts of like grade and quality is shown by direct customer testimony. These customers testified that the 2 percent cash discount is essentially important to them in the conduct of their business.[*] For example, Mr. Louis A. Roazen, Treasurer of Standard Auto Gear Co., Inc., Brookline, Massachusetts, testified in part as follows:

> "Q. Mr. Roazen, in the purchase of merchandise for resale, is the cash discount of 2 percent important to you?"
>
> * * *
>
> "The Witness: The answer is yes. * * * The amount that you are able to show as a profit which the company realizes is by availing yourself of the cash discounts. It is quite often the difference between a profit and a loss in any particular year."

Mr. Sol Goosay, copartner of Penn Auto Parts, Scranton, Pennsylvania, testified as follows:

> "Q. Do you take advantage of the cash discounts offered to you by your various suppliers?
>
> "A. We do.
>
> "Q. Why is that?
>
> "A. For a number of reasons, one, it's necessary to reduce your costs, increase your profits, to meet your competition."

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[*] Similar testimony was considered on the same points by the Commission in Docket No. 3200, H. C. Brill Company, Inc., 26 FTC 666, FTC v. Morton Salt Company, 334 U.S. 37.

Respondent contends that, since these customers also testified that because resale prices are maintained they were not injured by the varying net purchase prices, there can be no finding by the Commission that there is reliable, probative and substantial evidence that the effect of respondent's varying net purchase prices may be substantially to lessen competition in the secondary line of commerce.

214 We cannot agree. Certainly if, as respondent's customers testified, the 2 percent cash discount is essentially important to them, it cannot be gainsaid that the substantially higher discounts or rebates reflected in the varying net purchase prices are even more important to them.

In order for a wholesaler or distributor of automotive parts to successfully complete, he must not only be in a position to meet or beat his competitors' prices, which respondent would have the Commission use as the sole test here, but he must maintain a superior sales force, warehousing and delivery facilities, and advertising and promotional activities, and in other ways be able to present his products.[5] This is especially true here, since, as in the Scranton-Wilkes Barre area, the purchasers of respondent's lines of automotive parts cover a rather wide geographic trading area.

Testimony by respondent's customers as to adherence in their trading territory to the suggested resale prices does not support respondent's exception to the examiner's finding that the effect of respondent's different prices of commodities of like grade and quality to competing customers may be substantially to lessen competition. In Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 742, the Supreme Court stated:

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[5] See also Docket No. 5771, In the Matter of Namsco, Inc., March 17, 1953, in which it was found that "price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, proximity to customers—all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise."

> "But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

215 We think that it was the intent of Congress that the Commission should take such elements into consideration in determining the question of whether or not the effects of such a pattern of pricing may be substantially to lessen competition. In House Report No. 2287, 74th Congress, 2nd Session, which was the report of the House Committee on the Judiciary on the bill which, among other things, resulted in the present language of Section 2(a) of the Clayton Act, as amended, the Committee stated in part:

> "Section 2(a) attacks directly the problem of price discrimination. Like present section 2 of the Clayton Act, it contains a general prohibition against such price discriminations, from which certain exceptions are then carved.
>
> "Section 2(a) attaches to competitive relations between a given seller and his several customers. It concerns discrimination between customers of the same seller. It has nothing to do with fixing prices

> nor does it require the maintenance of any relationship in prices charged by a competing seller.
>
> "Discriminations in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them."

As in the Moog case, where, as to this same issue of injury, there was similar evidence, we find that there is reliable, probative and substantial evidence that the effect of respondent's varying net purchase prices which it granted in the sale of its lines of automotive parts of like grade and quality to competing distributors and jobbers may be substantially to lessen competition in the secondary line of commerce.

The order which we entered in the Moog case (Docket No. 523) is identical with the order proposed in the initial decision herein. As in the Moog case, respondent here takes exception to the form and substance of the 216 order, contending that it is too general, that the price discrimination statute as construed and applied by the examiner is unconstitutional and fails to comply with the standards of definitions and reasonableness required by due process of law under the Fifth Amendment to the Constitutional; and that the Commission's enforcement of the proposed order will constitute a denial of due process. For the same reasons which we gave in the Moog case, these exceptions of the respondent are denied. See F.T.C. *v.* Ruberoid Company, 343 U.S. 470; Engineers Public Service Company *v.* Securities and Exchange Commission, 138 Fed. 2d 936.

It is our opinion that the hearing examiner decided this matter correctly. The appeal of the respondent and the exceptions of the respondent, including those to the procedural rulings of the examiner, the findings of the examiner, the failure of the examiner to make certain findings, and to the form, substance and constitutionality of the proposed order are denied. The examiner's findings, conclusions and order are adopted as the findings, conclusion and order of the Commission.

Commissioner Kern did not participate in the decision in this matter.

Commissioner Mason dissented.

April 26, 1956

217

UNITED STATES OF AMERICA
Before Federal Trade Commission

Commissioners:
John W. Gynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

* * (Caption—Docket No. 5913) * *

DISSENTING OPINION

By Mason, Commissioner

The question of competitive injury here is the same as in the Moog case.[1]

The evidences here is of like ilk. There is, in my opinion, no competitive injury, nor any reliable, probative and substantial evidence to support the finding of injury enunciated by the majority.

I am against it.

/s/ Lowell B. Mason
Lowell B. Mason
Commissioner

April 26, 1956

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[1] In the Matter of Moog Industries, Inc., Docket No. 5723.

CHARLES STANLEY ROGERS, called as witness on behalf of the Commission, testified as follows:

Direct Examination.

223 My name is Charles Stanley Rogers. I am General Manager of the P. & D. Manufacturing Company, in charge of sales. I have held that position for 17½ years.

226 Commission's Exhibit 1 for identification is our Catalog No. 49, covering the specifications of ignition replacement parts to fit the Delco-Remy, Auto-Lite and Ford systems, showing parts and pictures of the various parts which we manufacture.

The catalog was in effect for the Calendar Years 1949 and 1950 and was distributed to the trade. P. & D. Manufacturing Company sold the ignition parts described in the catalog.

227 Commission's Exhibit 2 for identification is a supplement sheet to Commission's Exhibit 1 and was effective during the years 1949 and 1950.

Commission's Exhibit 3-A, -B, -C, and -D is a supplement to Commission's Exhibit 1 for identification.

228 The exhibit was printed in June, 1950. To the best of my knowledge the exhibits are all the catalogs during the years 1949 and 1950.

229 The Commission's Exhibit 4-A, -B, -C, -D, -E, -F, and -G for identification is our catalog for parts to fit Ford, Mercury and Lincoln cars, showing specifications, models and pictures of the parts and attached thereto are three suggested price sheets.

230 Commission's Exhibit 4-E for identification discloses the price at which the jobber purchases from the P. & D. Manufacturing Company.

Commission's Exhibit 4-F for identification is a price sheet which was distributed to the large service stations carrying stock, garage and repair shops as well as a suggested price for their jobber to sell at.

Commission's Exhibit 4-G for identification is a price sheet effective August 26, 1949 showing catalog number, list price and dealer price.

231 The column entitled "List Price" shows a suggested price for the jobber to sell the item which he purchases.

232 Commission's Exhibit 1 for identification, 5-A, -B, -C, -D, -E, -F, and -G is a jobber's price sheet showing our number, popularity key, standard package, list price and jobber price.

233 Commission's Exhibits 5-A and -B for identification were sent to automotive jobbers or wholesalers. In fact price sheets were sent directly to the jobber. We had nothing to do with sending them to the dealer or service stations.

234 Commission's Exhibit 6-A for identification shows our catalog and popularity key, standard package, list price and jobber price sheet, and would apply to Commission's Exhibit 1 for identification.

Exhibit 6-C is a supplement to Commission's Exhibit 6-A for identification.

Exhibit 6-D is also a supplement.

235 Commission's Exhibit 6-C for identification is jobber's price list and Commission's Exhibit 6-D for identification is entitled "Confidential Price List". The jobber's price list shows the list price and the jobber price. The confidential price sheet is given to the jobber so that he, in turn, can give it to his customer. We have nothing to do with that. The confidential price sheet, is the service station price sheet, but because some of our competitors call it "Confidential" we call it "Confidential".

Commission's Exhibit 6-D for identification does not tell us what price the wholesaler pays for the part. It shows that it is the jobber's price sheet.

Commission's Exhibit 6-E for identification applies to Commission's Exhibit 1 for identification, shows our catalog number, standard package, list price and confidential price sheet.

236 Commission's Exhibit 6-G is also a price sheet showing catalog price, standard package, list price and service station price and is applied to our catalog, Commission's Exhibit 1.

Commission's Exhibit 6-I for identification shows catalog number, standard part, list price, service station price and applies to Commision's Exhibit 1 for identification.

237 Commission's Exhibit 6-J for identification is dealer's price list, shows catalog number, standard package, list price, dealer price and applies to our catalog as shown in Exhibit 1 for identification.

Commission's Exhibit 6-L for identification is supplement to our price sheet showing new items, also catalog number of these items, list price, standard package, dealer price sheet and applies to Commission's Exhibit 3-A for identification.

239 We don't know whether the prices as shown on Exhibit 6-A through 6-L are adhered to or whether they are sold on that basis. We think that the prices we give out are followed. They are suggested prices. We have no control over any prices after they leave our hands. The same is true of Commission's Exhibit 5-A through 5-H for identification.

Commission's Exhibit 7-A through 7-F is jobber's price sheet effective October 12, 1950. Shows catalog number, popularity key, standard package, list price, jobber price sheet and is sent to the jobbers.

240 Commission's Exhibit 7-C for identification is price sheet effective October 12. Shows standard package, catalog number, list price, confidential price sheet and is also sent to jobbers who distribute to the trade.

Commission's Exhibit 7-E for identification shows catalog number, standard package, list price and dealer's price sheet. This is sent to jobber to redistribute it. The figures 1.17 and 1.07, I imagine, indicate an error in the price sheet and it was changed by Mr. Magner. There is one price sheet missing, I just noticed, there should be a service station price sheet with the Exhibit.

241 I will attempt to find that sheet for you.

Commission's Exhibits 8-A and -B show catalog number, popularity key, standard package, list price and jobber price sheet, effective November 25, 1950.

242 Commission's Exhibit 8-C is termed "Confidential Price List", but I do not want the word "confidential" misconstrued. The word "confidential" is used in the automotive trade not as a confidential or inside price, it is just a name that is used for another price sheet. It shows our catalog number, standard package, list price, and service station price.

Commission's Exhibit 8-G for identification shows catalog number, standard package, list price and the dealer price.

The confidential sheet is a sheet that is given to our distributor.

243 It is given to the jobber and the jobber passes it on to his customer. We do not do business direct with anyone but the jobber. As a matter of fact it is not a confidential sheet at all. It passes from the distributor down to the trade.

244 The effective date of Commission's Exhibits 4-A

through 4-D for identification, according to the printing, is fourth month of 1949.

245 Commission's Exhibit 4-A through 4-D were effective during the remainder of the year of 1949 and the entire year of 1950.

Commission's Exhibits 4-E, -F, and -G were price lists effective for the year of 1949 after August 26 and the entire calendar year of 1950.

247 Commission's Exhibit 9 for identification is catalog covering fuel pumps, rebuilt kits and diaphragm kits.

248 Catalog shows our various part numbers, shows the various cars, buses, trucks and engines that these items fit, together with showing the car manufacturer's number and the exchange number, both the new and the rebuilt units.

This catalog was used during 1950.

249 Commission's Exhibit 12-A is a supplement to Commission's Exhibit 9 for identification and shows the new items and the 1950 and 1951 specifications of passenger cars. It represents the only supplement that was issued to the catalog, which is Commission's Exhibit 9 for identification.

Commission's Exhibit 10-A through 10-F is price sheet effective July 29, 1949, showing catalog number of the part, the popularity key, the list price and the jobber price of each item.

250 Commission's Exhibit 10-C for identification is termed our "Confidential Price Sheet", was sent to the jobber, and shows the catalog number, the list price, the confidential price in lots of six and in lots of twelve.

Commission's Exhibit 10-E for identification is a price sheet, shows the catalog number of the part, the list price and the dealer price sheet.

As I explained, although printed in 1949, they did not go into effect or weren't used until 1950.

Commission's Exhibit 11-A through -F for identification is jobber's fuel pump price sheet, showing the catalog number, popularity key, list price and jobber price.

251 Commission's Exhibit 11-C for identification is price sheet effective November 25, 1950, shows catalog number of the part, the list price and the confidential price sheet, showing the prices of six and twelve items.

Commission's Exhibit 11-E for identification is price sheet effective November 25, 1950, supersedes all previous quotations, shows the part number, catalog number, list price and the dealer price of each item.

Commission's Exhibit 13-A through 13-H for identification covers carburetor kits to fit the Ford, Chevrolet and Plymouth cars. It shows pictures of various carburetor kit assortments and the buyer's guide, and the comparative code chart to the manufacturers' numbers. It was printed in the first month of 1949 and effective during the calendar years of 1949 and 1950.

252 Commission's Exhibit 13-E for identification applies to Commission's Exhibit 13-A for identification. It shows part number, the list price and the jobber price of all items.

Commission's Exhibit 13-F for identification covers carburetor kits and gasket packages.

Commission's Exhibit 13-G for identification cover—carburetor kits and gasket packages was effective January 26, 1949.

Commission's Exhibit 14-A covers our complete line of carburetor repair kits, gasket packages and carburetor kits assortments, together with car guides, the year of the make of the car, the model and our particular part number.

253 Commission's Exhibit 14-E is our price sheet effective September 26, 1949, covers carburetor kits,

shows the part number, the list price and the jobber price.

Commission's Exhibit 14-F is the same covering the price sheet JC-50.

Commission's Exhibit 14-G is similar to 14-F with the exception of the price sheet. This covers the same such as part numbers, and so forth.

Commission's Exhibit 14-H covers list price, dealer price and is similar to the other information I gave on the price sheets before.

254 To the best of my knowledge Commission's Exhibits for identification, 9, 10, 11, 12, 13 and 14, were distributed to the trade.

255 Commission's Exhibit 15-A for identification is dis-
256 tributor's franchise agreement, application and acceptance. It has been effective for ten or fifteen years and was effective during the calendar years 1949 and 1950.

Commission's Exhibit 15-B for identification is the distributor's rebate agreement. And it was effective during 1949 and 1950.

257 We had the rebate for fifteen or eighteen years.

Commission's Exhibit 15-D for identification is a monthly report of the P. & D. distributors' sales to the P. & D. jobbing accounts, that is the smaller jobbers.

258 The distributor makes distribution to the smaller jobber throughout the country, who doesn't see fit to buy direct from the factory. It was in effect during the years 1949 and 1950.

Commission's Exhibits 16-A through -H for identification are jobber contracts, warehouse distributor's contracts, showing that he has signed up a certain jobber, and were in effect during 1949. The green copy is our district manager's copy.

Commission's Exhibit 17-A, -B and -C for identification is distributor's fuel pump franchise agreement. 17-C is a monthly report of P. & D. distributors and P. & D. jobbers on fuel pumps.

259 They are fuel pump contracts or agreements and were in use during the year 1950.

Commission's Exhibit 18 for identification is a letter sent to all of our accounts and it must have been during the year 1949. The subject was "Defective Merchandise and Replacing of Same."

260 The letter gave our jobbers the policy of how we would handle the obsolescent merchandise and how we would take it back, selling charges and so forth. The policy announced in Commission's Exhibit 19 for identification has been in effect many, many years.

The policy announced in Commission's Exhibits 18 and 19 for identification were in effect during the years 1949 and 1950.

Witness was excused.

271-304 Commission's exhibits 1 through 20 for identification admitted in evidence.

285 CHARLES S. ROGERS resumed the stand.

I don't know the exact year that Commission's Exhibit 17-C became effective. The exhibit calls for a rebate on monthly purchases up to $199 of 10 per cent, and up to $200 or more, the rebate will be 15 per cent.

288 As general manager in charge of sales, I see that the accounts are sold and that those which we have are taken care of with certain merchandising, advertising helps and aids, hiring salesmen and taking care of the territory. I don't handle the advertising. We have another man by the name of Magner who handles it. We also have an advertising agent. We look it over.

289 As general manager, I personally call on P. & D. accounts and I am pretty well acquainted with the

majority of them. The customer types to whom P. & D. products are sold are in the after market business known as automotive wholesalers or jobbers. I would say that we have anywhere from 1200 to 1500 accounts. They are located all over the United States and throughout the world.

We do not operate warehouses as such, or under the name of P. & D. Manufacturing Company. We rent space in warehouses throughout the United States at different points.

290 If my memory serves me right at the present time, the locations would be Los Angeles, Dallas, Kansas City, Chicago, Atlanta, Toronto, Canada, and Portland, Oregon.

Stocks are carried in those warehouses and the jobbers from the various parts of the country that are located in the warehouse areas pick up from the warehouse stocks.

None of the warehouses that we rent or lease, are leased from any of our customers.

P. & D. employes between 20 and 28 salesmen. All are full time except three. The three are manufacturers agents.

I do not know that manufacturer's agent operates similarly to a broker, but a manufacturer's agent
291 operates for two or three manufacturers or more, selling different lines. They are not competitive in most cases. He is paid on a commission basis. We have district managers—about 18 They act in a dual capacity, both as a district manager, a salesman and a field or a missionary man. In some territories where there are field men under them, they more or less supervise the field men or field engineers, as we call them.

Field engineers work in conjunction with jobber salesmen, going out and cleaning up spots and letting the jobbers' customers know about the products, the technical end of it. In other words, assistance to the jobbing institution and its salesmen.

292 They sell P. & D. merchandise in conjunction with the jobber's salesmen.

293 Commission's Exhibits 6-A through 6-L are furnished to the jobbers and distributors.

Commission's Exhibits 6-A, -B and -C, the blue-colored sheets are the jobber's net cost sheets. That is what we price our jobbers on, that is the jobber's sheet.

294 Commission's Exhibits 6-D and -E, the pink-colored sheets are sent to the jobber and he gives them out to the trade.

Commission's Exhibits 6-G, -H and I, the green sheets, are sent to the jobber and he sends those to the trade.

Commission's Exhibits 6-J, -K and -L are sent to the jobber and he in turn sends them to the trade.

Commission's Exhibit 6-A, -B and -C is not a list, it is the net jobber price. That is what he is billed at. He is billed at that price before the discounts are taken off.

295 On Commission's Exhibit 6-A is the term "list price". I don't know who pays that price. We have a net price which the jobber pays us. The car owner might pay the list price, but whether the dealer sells at it I don't know. We prepare and send it to the jobber for his intended use. It is our recommended price for the ultimate consumer. We take it from the car manufacturer and try to keep the competitive position of the car manufacturers.

296 The price referred to in Commission's Exhibit 6-A, -B and -C is the recommended or suggested price to the jobber.

297 I don't know whether the recommended list price, which appears on Commission's Exhibit 6-A, -B and

-C, is higher or lower than that of the car manufacturer. Some might be lower, some might be a little bit higher; in fact we try to be a little bit lower. I do not think that the prices are the same as our competitor's list prices.

Commission's Exhibit 6-D and -E, the pink colored sheets entitled "Confidential Price List", are given to the customer by the jobber. The word "confidential" doesn't mean anything.

298 It would be given to any one of the jobber's customers. We have no control after it leaves our hands.

The jobber sells to the retail trade, the garage man, the service station and the fleet owner. He might give this to the fleet owner, service station or car dealer. He might give it to the gasoline service station.

Commission's Exhibit 6-G through L, the answers would be the same as to the other sheets.

301 On Commission's Exhibit 6-A the terms 2% 10th prox. net 30 days means that the jobbers pay their bills on the 10th prox., they take 2% off their statements.

304 Commission's Exhibit 20 is incorrect in paragraphs 2 and 3 in that it should read that everybody receives 2% or more.

306 With reference to Commission's Exhibit 15-A, no volume rebate was paid in addition to the 20% and 2% for the years 1949 and 1950. It was paid in previous years.

308 The volume would be on the products we sold.

317 With reference to Commission's Exhibit 15-A concerning eight or more traveling salesmen, there may be some owners of the contract, who employ less than eight salesmen. We don't go out and check every account.

318 The Distributor's Rebate Agreement, Commission's Exhibit 15-B was inaugurated by the P. & D. Manu-
319 facturing Company many years ago and the terms are the same.

Commission's Exhibit 15-C entitled "Distributor's Rebate Agreement" came out at the same time.

324 Commission's Exhibits 5-A, 6-A, 7-A and 8-A are the price sheets upon which we bill at the jobbers price.

325 The rebates are granted in place or instead of the 2%. We bill at the jobber's net price and when jobber receives his statement he takes off volume rebate and discounts and sends us the check.

326 If payment is not made on the 10th of the month, he is not entitled to the 5, 7, 10 or whatever percentage it is. There are no exceptions to my knowledge. If he doesn't pay the bill within a certain time, he doesn't get the 2% discount nor the other discounts.

327 In some cases where there is a good explanation, we let him have it, but it is in lieu of the 2% as stated in the contract.

In connection with Commission's Exhibit 15-B, if you buy $149 worth of merchandise and pay within the time specified, you get 5%. If you buy $150 worth of merchandise and pay within the time specified, you get 7%. Anything below that is 2%.

And the holders of Commission's Exhibit 15-A get 20% plus a 2% cash discount.

328 Commission's Exhibit 20, rebate contracts 1 and 2, are Commission's Exhibits 15-B and 15-C, and 258 customers had such contracts in 1950.

There are 186 customers who had a contract which is illustrated by Commission's Exhibit 15-A.

329 Any holder of Commission's Exhibit 15-B or 15-C can earn any rebate as shown on that contract, but in

he didn't earn it he would still get 2% regardless. That is in the brackets on 15-B and -C.

330 The 92 customers on Commission's Exhibit 20 who get 10% would also have Commission's Exhibit 15-B and -C.

If purchaser bought less than $100 he got a 2% discount. If they purchased $149 they got a 5% dis-
331 count and if they purchased $199 they got 7% discount. If they purchased in excess of $200.00 they got a 10% discount.

The Commission's Exhibit 20, rebate No. 3, shows 56 customers and to the best of my knowledge that is a fuel pump rebate and would be Commission's Exhibit 17-B.

Purchasers who bought the fuel pump under Commission's Exhibit 17-A, would be a little bit more or less than 56.

333 The 258 customers shown on Commission's Exhibit 20 as getting rebates 1 and 2, means that they purchased under contracts 15-B and -C. The same is true of the 92 customers that got 10%. The majority of those that got 10% might be some customer who bought $2400 a year and buy $100 one month and $300 the next and for competitive reasons we gave them 10% regardless.
334 There might be some that didn't earn it, but they get it due to competitive conditions.

The same statement applies to the 86 customers on Commission's Exhibit 1 that receive a flat 15%.

Commission's Exhibit 15-D is a monthly report of P. & D. distributors—sales to P. & D. jobber accounts. This is used for secondary distribution account and is only on submission of monthly report. Anyone is entitled to it.

336 In addition to those jobbers that had contracts 15-B and -C, some also got a rebate of 10% and 2%

and others 15% and 2%. That was in the case of competition and in order to hold our accounts we had to be competitive.

337 The same testimony that I have given in regard to the ignition line and the ignition contracts, price lists, catalogs, and so forth, would be true of the fuel pump line with the exception of the difference in the amount of rebate which they can earn.

356 Commission's Exhibits 21 through 38 for identification, with alphabetical numbers were admitted in evidence.

357 We sold people like Tarbell-Watter, Standard Auto Gear, Mellor, for years. We sold them individually, but after they had gone into a co-operative group we were told that the instructions, orders, et cetera would be from Six States. I believe there is a formal contract with Six States, I don't know.

359 Motor Supply Company of Charleston, West Vir-
360 ginia is not a customer of ours any longer. They are doing business with Warehouse Distributors. We do not get any orders from Motor Supply Company. We do not do business with any of the people but one account. Phelps-Roberts of Washington, D. C. is not a customer. John Rogers of Atlanta, Georgia buys through a group. Auto-Parts Warehouse in Chattanooga buys through a group.

361 Womwell Automotive Parts are not customers of P. & D. They buy through Warehouse Distributors.

367 LOUIS J. ROAZEN called for the Commission, testified as follows:

Direct Examination.

368 My name is Louis J. Roazen. I live at Brookline, Massachusetts. I am treasurer of the Standard Auto

Gear Co., Inc., located in Boston, and its business is automotive parts and accessories. We have eight stores, two in the City of Boston, one in Watertown, Norwood, Milford, Quincy, Brockton and Arlington. They are all cities or towns in Massachusetts. Standard Auto Gear operates one warehouse at the main location.

369 We have fifteen salesmen. I would estimate that we carry about 125 lines. One of the lines is P. & D. Manufacturing Company products, which we have handled for an estimated five years. We sell P. & D. line to the general repair trade, the car dealer, the auto-

370 motive fleet owners and the industrial operators. The buyers are at the firm's various locations. Sales are at wholesale. I would estimate that 30% of the sales would be over-the-counter sales. Standard Auto Gear is a member of the jobber group known as Six-State Associates. I am one of the three trustees.

371 P. & D. salesmen call on our firm about every six weeks for promotional work. That is to see if the amount of volume that we are able to produce for them can be increased, attempting to find out where there are weaknesses in the promotional activities and sales activities and coordinate our relations between the two companies.

P. & D. salesmen accommodate Standard Auto Gear in this respect if requested and we make such requests from time to time.

372 P. & D. Manufacturing Company furnish us with price list and catalogs of their products.

Prior to membership in the Six-State Associates we obtained a rebate or volume discount of some nature from P. & D.—15% on all purchases.

373 Our orders to P. & D. are entered on an order form similar to Commission's Exhibit 39-A for identification and this is sent to P. & D., 39-B is retained by

us and 39-C sent to the headquarters of Six-State Asso-
ciates.

374 Commission's Exhibits 39-A, -B and -C admitted
in evidence.

On Commission's Exhibit 39-A, in the left-hand corner
or column, which has the wording "Order For", the name
P. & D. Manufacturing Company appears, and to the
right of that "Ship To" nothing would appear in our case
because all of the goods are shipped to central ware-
375 house at Dorchester. That would be Standard Auto
Gear in Dorchester, Massachusetts. Someone in our
organization would sign underneath the phrase "Six-
State Associates By".

376 Commission's Exhibit 40 for identification is a bill-
ing by the Six-State Associates to Standard Auto
Gear for a quantity of material from the P. & D. Manu-
facturing Company.

377 Commission's Exhibit 41 for identification is an
actual bill from Six-State Associates.

378 Commission's Exhibits 42-A, -B, -C and -D consti-
tute one month's statement from Six-State Associates.

384 Commission's Exhibit 40 for identification admitted
in evidence.

385 Commission's Exhibit 41 admitted in evidence, as
well as Commission's Exhibit 42-A through -D.

389 As a result of our issuing and forwarding to the
P. & D. Manufacturing Company the purchase order,
which is Commission's Exhibit 39, and the receipt of the
goods from P. & D. Manufacturing Company, we were
billed by Six-State Associates as disclosed by Com-
mission's Exhibit 40 and in paying that invoice 15%
discount was made.

390 We received further discounts from Six-State As-
sociates on P. & D. merchandise at the end of the
year. I think Mr. Marquardt would be better able to an-

swer what the discount is. The discount is calculated on the basis of the amount of purchases.

We pay dues to Six-State Associates of $125 per month.

On monthly statements of Six-States we exercise our
391 right to take a 2% discount.

393 Annual purchases of Standard Auto Gear of automotive parts for resale are approximately one and a half million dollars and about 8% is purchased through Six-State Associates in the manner which I have described. That amount holds true for the year 1950.

394 Standard Auto Gear does not purchase direct from P. & D. Manufacturing Company.

The salesmen from P. & D. Manufacturing Company who call on our branches, do not sell these branches.

Standard Auto Gear purchases P. & D. Manufacturing Company products from Six-State Associates.

395 And they in turn buy them from P. & D. Manufacturing Company. The discount that Six-State Associates receives on these purchases from the P. & D. Manufacturing Company is 10%, 10% and 2%, and the discount that Standard Auto Gear receives from Six-States is 15%. Standard Auto Gear purchased P. & D. Manufacturing Company products through Six-State Associates for the past four years.

396 The 15% which I received after joining up as a member of Six-State Associates is the same the same percentage that I received before joining.

397 Motion to strike all of the testimony of the witness relating to purchases made from Six-State Associates of P. & D. Manufacturing Company products, which in turn were purchased by the Standard Auto Gear Company, for the reason that Standard Auto Gear is not a customer or purchaser with respect to these products from the respondent was denied.

ARTHUR G. MARQUARDT called as a witness on behalf of the Commission, testified as follows:

Direct Examination.

399 I am treasurer of Hunt-Marquardt, Inc.

400 And trustee and general manager of Six-States Associates. Hunt-Marquardt, Inc. is in the automotive jobbing business, and is located in Allston, Massachusetts, has four branches located in Lawrence, Lynn, Brockton and Quincy. The firm operates a warehouse for its own requirements at 244 Brighton Avenue. The address of Six-State Associates is the same. Hunt-Marquardt employs twelve salesmen. The trade area which we cover is the same trading area of our branches and headquarters.

402 It takes in eastern Massachusetts.

Six-State Associates is a successor to Six-State Sales Incorporated. The succession took place the first day of January, 1950. The names and locations of the members are as follows:

Auto Electric Service Co., Inc., Manchester, New Hampshire, Christie & Thomson, Inc., Worcester, Massachusetts, Farrar-Brown Company, Portland, Maine, Grinold Auto Parts, Inc., Hartford, Connecticut, Hager Hardware & Paint Co., Burlington, Vermont, Hunt-Marquardt, Inc., Boston, Massachusetts, William T. Manning Co., Inc., Fall River, Massachusetts, Mellor's Auto Parts, Providence, Rhode Island, Standard Auto Gear Co., Inc., Boston, Massachusetts, and The Tarbell-Watters Company, Springfield, Massachusetts, and Horton Gellocreaner, New Haven, Connecticut.

404 There are 45 branches among this group of members.

The Six-State Associates, a Massachusetts trust, has three trustees—Louis J. Roazen, Alfred S. Hunt and myself.

405 In 1950 Six-State Associates had an arrangement with about 16 different suppliers of which P. & D. was one. The process of taking on a line is brought about through the solicitation on the part of the supplier; it is voluntary. He submits a proposal to us, perhaps myself, for the handling of the line. This will vary from straight sales, manufacturing and perhaps warehousing setup or a combination of both, and I would submit his proposal to our directors for their consideration and if the majority
406 of our associates are in favor of handling that particular line then we proceed to accept the proposal which has been submitted.

P. & D. line was solicited by Charlie Rogers and when Six-States was first solicited three of the members were handling the P. & D. line.—They were Tarbell-Watters, Standard Auto Gear and Mellor's Auto Parts. And since that time a fourth member, William T. Manning Company, Inc. has handled the P. & D. line. I believe that William T. Manning Company started to purchase P. & D. products in 1950.

407 I am general manager of Six-State Associates and my duties consist of the general direction of the business, the administration of which entails supervision of our physical warehouse activities, sales promotional activities, credit, etc. Six-State Associates had eight employees in addition to myself. They are full-time employees, no relation with Hunt-Marquardt, Inc. Three of them are clerical and the other five, several of them in the warehouse, one or two technical experts and then I have an assistant.

408 When we receive copy of Commission's Exhibit 39-C we enter it in our open file to be matched up with the invoice from the supplier indicating that the transaction has been completed. We receive a monthly statement from each supplier. In the case of P. & D. that is also true.

409 A monthly statement from P. & D. would embrace all purchases that have been forwarded that month to P. & D.

We do not have a written arrangement or agreement with P. & D. We have a verbal arrangement. The volume of discounts or rebates is 20% below their published cost sheets. That is familiarly known as the blue list, and in addition we receive 2%. After we receive this we in turn prepare statements for each member who purchased P. & D. products.

410 In the case of Standard Auto Gear and the Tarbell-Watters, we extended a volume rebate of 15% right across the face of the invoice for the P. & D. purchases. In the case of William T. Manning Company and Mellor's Auto Parts we extended 10% volume rebate.

An objection to the line of testimony for the reason that Six-State Associates, Manning Company, Mellor's Auto Parts, Standard Auto Gear and Tarbell-Watters are not shown to be purchasers from P. & D. Manufacturing Company was overruled.

The reason that we allowed Standard Auto Gear and Tarbell-Watters 15% is that we were aware that they were receiving 15% direct from P. & D. prior to our arrangements and we therefore continued to extend the
411 15% discount to these companies. The regular 10% which was passed on to the other companies was the 10% which was generally in vogue, as we understood it, to all P. & D. accounts that had certain quantity purchasing ability.

412 Commission's Exhibits 43-A and -B for identification are detailed listings of all of our transactions with the P. & D. Manufacturing Company during the period of 1950. It is made up to show the breakdown of the purchasers from P. & D. Manufacturing Company among the four accounts purchasing P. & D. Products

for the year 1950.

416 Information on this document does not indicate the kind and quantity of various products purchased through Six-State Associates by the various members. It is merely a tabulation listing of the purchases by dates and amounts.

420 Commission's Exhibits 43-A and -B for identification admitted in evidence.

426 Commission's Exhibit 24 is one of those exception unusual transactions where an order was placed by one of our associates, the Tarbell-Watters Company, for a drop shipment direct from P. & D. to one of their dealer accounts. Apparently they didn't have the item in stock and the customer was in an unusual hurry, so they entered the order for direct shipment to the customer to save time.

446 *Cross Examination.*

During the sample year 1950, William T. Manning Company, Mellor's Auto Parts, Standard Auto Gear and Tarbell-Watters did not compete with each other in the resale of P. & D. Manufacturing Company products.

447 They do not even overlap in their trading areas. William T. Manning Company, Incorporated bought from Six State Associates, P. & D. Products for virtually only Ford automobiles.

448 The ignition parts purchased by Six-State Associates from P. & D. and subsequently resold to the four accounts named are primarily not interchangeable. You order parts specifically for certain use on certain makes of cars. In other words you have ignition parts for Ford automobiles ignition parts for Chrysler automobiles, ignition parts for Buick automobiles, and so on. You also have spark plugs for all of them and they are ordered by size. You order them by size and number. You have to order a spark plug particularly designed

for a particular make of car.

449 You have to order particular model of spark plugs for particular model of cars. The spark plug that is turned out for a 1952 will not fit all 1952 cars. There are numerous numbers of spark plugs, all different threads and different temperatures and they are specifically designed for those particular motors. They are designed with model numbers to fit the particular motor and the same is true with respect to ignition parts, particularly the P. & D. ignition parts.

451 Four companies, William T. Manning Company, Mellor's Auto Parts, Standard Auto Gear and Tarbell-Watters sell similar articles, but they do not sell them in the same sales territory.

458 WILLIAM S. OPDYKE called as a witness on behalf of the Commission, testified as follows:

Direct Examination.

459 My name is William S. Opdyke. I am an accountant with the Federal Trade Commission and have been so employed for approximately eleven years. My work consists of field investigations, collecting costs and price data, compilation of tabulations and charts, writing memoranda and reports concerning the same. I have a Bachelor of Commercial Science and Master of Commercial Science, Southeastern University, and am a graduate of Wake Forest Finance School. I have jointly prepared or assisted in the preparation of tabulations which have become matters of public record in other formal proceedings.

460 I spent approximately two months at the offices of the respondent. I examined generally the monthly statements of the respondent as to his customers' debit and credit memoranda, invoices, cash book, sales journals, and a few freight bills.

Commission's Exhibits for identification 46-A through 46-E, 47 and 48, were prepared either personally or under my direct supervision.

I am generally familiar with the record consisting of the exhibits and transcripts in this proceeding.

461 The customers appearing on the five pages of Commission's Exhibit 46 for identification were submitted by the respondent and by agreement of the attorneys.

Column 2 on Commission's Exhibit 46-A entitled "Total billing" was obtained principally from the respondent's monthly statements to his customers, supported by invoices and in a few instances of sales, the journals and cash books were used.

Column 3 on Commission's Exhibit 46-A for identification the information was gathered from the invoices.

Column 4 on Commission's Exhibit 46-A "Freight allowances," was gathered from monthly statements as supported by the credit memoranda.

462 Column 5 on Commission's Exhibit 46-A for identification, headed "Net items," was gathered from both monthly statements and invoices.

Column 6 on Commission's Exhibit 46-A for identification, headed "Total Sales Subject to Rebate Discount," is column 2 minus columns 3, 4 and 5, which equals column 6.

463 Column 7 on Commission's Exhibit 46 for identification was from the credit memoranda as supported by the invoices.

Columns 8 and 9 on Commission's Exhibit 46-A for identification, headed "Rebates and Discounts allowed," were obtained from monthly statements. The figures appearing in column 9 is the relation that column 8 bears to column 7, or the per cent thereof.

464 Column 10 on Commission's Exhibit 46-A for identification was obtained from the same source as

column 7; that is, the monthly statements and supported by the invoices.

Column 11 is from the monthly statements and column 12 again, is the per cent that column 11 bears of column 10.

Information contained in column 13 on Commission's Exhibit 46-A for identification was obtained from the monthly statements plus the total of column 8 and column 11.

465 My testimony and explanation would be the same for the succeeding pages of Commission's Exhibit 46-B, -C, -D and -E as has been given for 46-A.

465 The Commission's Exhibit 47 for identification was prepared from information furnished me by the respondent. Column 1 on said exhibit, in which appears Greenfield and Northampton towns under Massachusetts, and also Springfield and Pittsfield towns, were subsidiaries or other offices of the members in those towns and were bracketed by code on each of the monthly statements.

466 The information contained in column 2 on Commission's Exhibit 47 for identification, entitled "Total Billing," was obtained from the monthly statements of the respondents to Six State Associates and the monthly statements to the group plus the support of the invoices.

Column 3 on Commission's Exhibit 47 for identification, headed "Parcel Post and Insurance," was gathered from invoices, and column 4 information was obtained from credit memoranda and freight bills.

467 Column 6 on Commission's Exhibit 47 was obtained from information on monthly invoices and is column 2 less columns 3 and 4.

Column 7 the information was obtained from statements and invoices.

Column 8 was obtained from monthly statements and for column 9 it is the percentage that 8 is of 7.

468 Column 10 was obtained from monthly statements and invoices, and column 11 from monthly statements. Column 12 is the percent that 11 is of 10.

Column 13 is from the monthly statements plus the total of columns 8 and 11.

The column 1 on Commission's Exhibit 48 for identification entitled "Customer and Location," was obtained from the respondent.

469 Column 2 on Commission's Exhibit 48 was obtained from monthly statements and invoices.

The explanation with reference to Commission's Exhibit 47 for identification would be the same as for the columns appearing on Commission's Exhibit 48 for identification.

Cross Examination.

I spent approximately two months with P. & D. Manufacturing Company, examining records. One man was
with me all of the time and another man approxi-
471 mately two or three days. We examined in that
period of time three to four thousand invoices.

Each of the so-called customers on Exhibit 46-A for identification was the total billing for the entire year of 1950, that is all of one customer's transactions in the year 1950.

The first account on Exhibit 46-A, column 1, the Detroit Supply Company at Albany, New York, had three monthly statements issued to it. I do not know the num-
ber of invoices appearing on each of the monthly
472 statements, I could not say. In other words, it could
be six invoices in one of those months or it could be twelve or more.

My answers would be the same for all of the other customers listed on Exhibit 46-A through 46-E, except a possible variation in the number of monthly statements. In other words some customers had monthly statements every month and others had maybe two or three during the year. The number of invoices appearing on that monthly statement vary.

The figures contained in column 2 on Exhibits 46-A through 46-E for identification are the summaries of the totals of the monthly statements, with one exception and that may be that the monthly statements for January, the beginning of the year, may have included the balance or something from 1949 for which an adjustment was made. We tried to confine it to 1950 purchases.

473 In my computations of columns 8 and 11 on Commission's Exhibits 46-A through -E, inclusive, took into consideration the 2% cash discount allowed a customer. Columns 8 and 11 are the total of the R. & D. as marked on the various statements. In other words, if a customer took the cash discount when he was entitled to it, it was reflected on the statement, and that is the basis from the figures as reflected on this summary.

If he did not take it, it would not be reflected in the two columns.

474 And if he did not take the discount it would have influence upon the percentage figures contained in columns 9 and 12.

If the customer did not take it in any specific instance or if the customer took it in one month and a succeeding month or months he did not take the benefit of the 2% cash discount, that would affect the percentage figures as shown in columns 9 and 12.

P. & D. allows or grants a monthly rebate in varying amounts and the percentage varies between the ignition line and the fuel pump line.

476 The fact that a customer would purchase an amount sufficient in one month to entitle him to a discount

under the rebate schedule and in a following month would not purchase an amount sufficient to entitle him to a rebate, would on a yearly computation such as has been made in Exhibits 46-A through -B, inclusive, influence the percentage as shown in columns 9 and 12. The computations as contained in the exhibits do not show the monthly rebates, if any, that the various customers listed in column 1 received in any one month. It shows it only in total. It does not show it in detail. From looking at Commission's Exhibit 46-A, the account Detroit Supply Company, showing the total billing of $1,295.00 paid 8/3, and the percentage on the ignition line in column 9 of 21.55, and the account of Lusch Motor Parts Company on Commission's Exhibit 46-C for identification, showing a billing of $1,614.95 and a percentage figure in column 9 of 8.44, I cannot tell whether in any one month the two accounts mentioned received or earned the same rebate amount.

477 My answer would be the same as to any other names listed on Commission's Exhibit 46-A through -E.

During my sojourn at P. & D. Manufacturing Company the only determination that I made of the turn-over of the stock in any of these customers listed on Commission's Exhibit 46-A through -E, is that many of the customers purchased regularly; that is, they had a monthly statement each and every of the twelve months and on those statements there were numerous invoices. The amounts on the invoices would vary, naturally, depending on the product purchased or the number of items.

I did not make any study of the number of times a fuel pump for a Ford car was repeated on the orders for any one or all of the customers.

478 I do not know what any of the items on the invoices were and it is not shown on the exhibit. During

the year 1950 P. & D. sales were by far the greatest in the ignition line. The fuel pump was very, very small. The ignition line consisted of the general ignition line for an automobile; that is, condensers, coils, points, regulators, and the various replacement parts for those.

479 There are excess of 200 customers listed on Commission's Exhibit 46-A through -E and 47 and 48 for identification.

480 Commission's Exhibits for identification 46-A through -E, and 47 and 48, purport to show a breakdown into the ignition and fuel pump, but there is no attempt to break down into the various commodities.

Hearing Examiner Ballinger: I have a little doubt as to the propriety of this line of examination. Would you tell me what bearing this has upon the evidence that has been offered?

Mr. Flanagan: It is just an endeavor, your Honor,
481 to emphasize the number of items manufactured by
this respondent, and in the individual lines, the breakdown there in the ignition line, there are ignition parts specified for 36 passenger automobiles, for 36 different makes of passenger cars.

Hearing Examiner Ballinger: Does not this report include all purchases made by the parties made during the year 1950?

Mr. Flanagan: From this witness' testimony, it does, your Honor.

Hearing Examiner Ballinger: Well, if it does, what difference does it make how many different kinds of items were purchased?

Mr. Flanagan: Your Honor, our contention there is there has to be a showing of a sale of like grade and quality. Here we have a respondent who manufactures two major lines, which, in turn, are broken down into a number of distinct items. Using the ignition line, for

example, there are—I forget how many I read off there, but there are seven or eight or ten different items. Then those items have different specifications for all the passenger cars and for the trucks, marine engines, diesel engines, so on and so forth. As I stated, there are, I think the exhibit shows, according to my computation, 36 different makes of automobiles and 110 trucks, tractors and marine engines. Now you can have a sale of an ignition
part for a marine engine to one man, you can have
482 a sale of an ignition part to a Ford dealer, or whole-
saler right next to him or adjacent to him, there would be no competition between the two sales, they could sell them at any price they chose, there is no competition; in other words, they are not in competition with one another.

A Ford part would not be in competition with a Lincoln part, and so forth. I mean, it goes on, there is no competition with the truck ignition and passenger car, truck and marine engine, or, marine and automobile. There is no showing here, your Honor—that is what I am endeavoring to bring out, as to any competition between these various parts.

They are just dollar totals. We are not dealing with an item of salt where all salt is the same.

Hearing Examiner Ballinger: Isn't that a matter of rebuttal testimony?

Mr. Flanagan: I don't think it is, your Honor. I think the burden is on the Commission to show, in the first instance, that there is a sale of like grade and quality.

Hearing Examiner Ballinger: In other words, you think it is incumbent upon the Commission to show that sales were made of the different classes to the different customers?

Mr. Flanagan: That is right, your Honor. Other than that, your Honor, they are just showing a method of

selling, they are not showing that we are selling
483 items that are in competition with one another at
varying prices. If this were a proceeding under the
Federal Trade Commission Act it might possibly be relevant evidence, but this is a price discrimination charge.

Hearing Examiner Ballinger: Was there an objection?

Mr. Mayer: Yes, sir, there was.

Mr. Schrup: Does your Honor wish us to be heard before he makes up his mind?

Hearing Examiner Ballinger: Yes.

Mr. Schrup: I think, if the Examiner please, that the objection can be summed up in the simple word that it is frivolous. These contracts that were issued on both the Ignition Line and the Fuel Pump Line were not issued on any one item in the line, they embraced all the items pertaining to that particular purchase. They did not issue a separate contract on each item, but on all the items.

Likewise, as to the price sheet. There is no price sheet put up for each of the single items but on all the items.

If you follow down the argument to its ridiculous end you will find, for instance, that we have had in other cases charts of this nature which involved brass fittings, where there were 100 different sizes of that particular item, and according to them we would have to take one small piece of brass fitting and show that the jobber
across the street bought that same brass fitting. It
484 is very possible that over the course of time, or dur-
ing the year, each of these jobbers bought the same
item on the same day, perhaps, but it would be impossible for us to take each one of the number of items that he has purchased, and to take each one of the items for all customers and show that during the year each one of the parties bought that particular item.

The offer for sale, the purchase price and rebates are offered to all the customers on the basis of the published list prices and published contracts. Anyone of the jobbers that handles the particular merchandise has the opportunity to buy any of them, and he gets the one price and the rebate. The difference in the rebate makes the difference in the buying prices. So I suggest the objection is, on the fact of it, frivolous.

Mr. Flanagan: The fact that it may, as Mr. Schrup says, put an insurmountable burden upon the Commission is equally true as far as we are concerned, in endeavoring to meet such evidence as it endeavored to be put in the case here by these exhibits today. Mr. Schrup says the Commission could never compute it. We, then, are endeavoring to meet a case which is on a course of conduct, we, then, are put to the burden of going back and endeavoring to compute these various items. The burden is upon them and they are trying to shift it to us.

Mr. Schrup: That is not true.

485 Mr. Flanagan: The statement of counsel that it is a frivolous objection, of course, is merely his self-serving statement.

Hearing Examiner Ballinger: The Examiner is of the opinion that this may run to the weight of the evidence, and the objection is overruled. Counsel may proceed.

I do not know the actual number of parts involved in the ignition line, but they would certainly run into the thousands.

487 An example from Commission's Exhibit 46-A for identification, which is an illustration of where a cash discount was not taken advantage of in the fuel pump line, is that appearing under Brooklyn, New York, S. M. Auto Parts, Incorporated, only $5.01 of rebate was allowed on $50.12 of sales, or a percentage of just 10%, so apparently the 2% was not taken.

488 I cannot determine the answer from the exhibits alone. I had to refer to my work sheets. The work sheets show only 10% allowed on the fuel pump purchases. There is no reference on my work sheet to the 2% cash discount.

489 My work sheets supporting the summary shows that on January 1950 the statement of the respondent to the customer shows a total billing of $50.12 worth of fuel pumps and $151.11 were the ignition line. The total rebate allowed was $20.12, which is 10% of the total amount of purchases in that particular month. There is no differentiation between the fuel pump and ignition line in the computation.

492 I did not see any account entitled Standard Auto Gear, Boston, Massachusetts, on the books of the P. & D. Manufacturing Company.

494 It is my conclusion that the consignee and customer are synonymous.

495 I did not make a study of the purchase orders in the instances listed on Exhibits 46-A through 46-E, and 47 and 48, and I don't know where the purchase orders came from relative to Six States and Warehouse Distributors. I don't recall having looked at either of the purchase orders.

497 On Exhibit 47 for identification in every instance the 20% and 2% were taken; that is, the group was built at the maximum discount of 20% and 2% and the same applies to members on Exhibit 48 for identification, Warehouse Distributors. My answers given relative to Commission's Exhibits 46-A through -E, inclusive, for identification would be the same if I were asked those questions concerning Exhibits 47 and 48 for identification; that is, Commission's Exhibits 47 and 48 for identification show only dollar sales, purchases or sales for
498 the year, and do not purport to show the breakdown of the individual items.

Redirect Examination.

499 In the invoices of the P. & D. Manufacturing Company the manufacturer sets out each item by number and a brief description and price. All items purchased at that particular time appear on the same invoice, except to the extent that there is a separate invoice for ignition and fuel pump.

Hearing Examiner Ballinger: Is there any objection now to the admission of the documents?

Mr. Flanagan: Yes, your Honor. We object to the introduction of evidence of Commission's Exhibits 46-A through 46-E, inclusive, and 47 and 48, for the reasons that the exhibits are mere summaries of thousands of documents examined by the employees of the Commission; and that there is no endeavor to show (1) that there is any competition between any of the so-called customers listed on the exhibits, (2) that there was a sale of goods of like grade and quality. The exhibit, as previously stated, merely shows dollar totals. The witness has testified, in his belief, that the respondent has thousands of various items, and to say that one item is in competition with another without evidence of the fact, is error in the conclusion so drawn. 500

Hearing Examiner Ballinger: How many parts are there to the fuel pump?

Mr. Flanagan: Your Honor, I can't answer that categorically.

Hearing Examiner Ballinger: Well, there is quite a number?

Mr. Flanagan: Yes, there is.

Hearing Examiner Ballinger: Is it your contention that the sale of one of those items it not in competition with the sale of another item?

Mr. Flanagan: For example, they use a cork gasket in a glass bowl, there is no competition if we sell a cork

gasket in a glass bowl, unless there is proof of the fact that we sell a cork gasket for a Ford which is in competition with a cork gasket that we sell for a big mammoth G. M. truck. There just isn't competition between many
of these items, your Honor. The same is true of the
501 ignition. If we sell an ignition part for a Ford, that
is not in competition with an ignition part for a marine engine.

Hearing Examiner Ballinger: If you sold either one of these to the two classes they certainly would be in competition, would they not?

Mr. Flanagan: I am sorry, your Honor, I can't say yes or no because I don't understand your Honor's illustration.

Hearing Examiner Ballinger: Well, if you sold a gasget to the two classes that are admittedly in competition with each other and you sold that gasket to both classes, that would certainly put them in competition, would it not?

Mr. Flanagan: That is right, if you sold the same gasket to two accounts which were in competition with one another.

Hearing Examiner Ballinger: Well, your objection to this is, it is not broken down into the particular items that are sold competitively, is that your objection?

Mr. Flanagan: That is right, your Honor, and in addition the exhibit does not show any individual instances of price discrimination. It is an over-all chart for the year 1950. We don't know, in any instance, whether or not, conceivably, under the rebate schedule, you can have customers buying similar amounts in the same month, I mean, the same customers for the subsequent month buy-
ing identical items. When a man does not reach a
502 certain quota he does or does not get a discount and
the other fellow does. I mean, we can't tell. We just

have a year's situation here. You can have a situation where they only buy twice in a year. You may have the first purchase in January and the last in December, the purchase in January may be at the identical price, whereas it is possible, on the basis of the amount purchased in the month of December, there could be a variance because of the rebate. But we don't know whether or not that is a fact, because it is impossible to determine from the exhibits offered what the situation is.

Hearing Examiner Ballinger: Is there any other objection?

Mr. Flanagan: And in addition, your Honor, there has been no showing that any of these so-called customers here are in competition with one another.

Hearing Examiner Ballinger: Do you expect that to appear on the face of the exhibit?

Mr. Flanagan: I think before it can be admitted into evidence, it has to be further connected up. Maybe subsequent evidence may make it admissible, but I don't think it is admissible at this time.

In addition, Exhibits 46-A and 46-B are sales in intrastate commerce, not in interstate commerce, and there
are no particular sales pointed out here or illustrated
which affect interstate commerce. The first two ex-
503 hibits, Exhibits 46-A and 46-B, purport to show sales
in the State of New York, where the respondent has
his principal office and place of business.

Again emphasizing what I argued before, your Honor, this is not any particular sale or sales at any time, but an attack on a method of doing business which, as I previously stated, may or may not be a violation of the Federal Trade Commission Act, but there is no showing here of a sale of goods of like grade and quality such as to constitute a violation as charged in the complaint.

If the exhibit is admitted in evidence it places an insurmountable burden upon the respondent in an effort to rebut the evidence purported to be shown on these exhibits of something over 200 accounts. Counsel in support of the complaint says it places an insurmountable burden upon the Commission. If we concede that we must also concede that it places an insurmountable burden upon the respondent.

Mr. Cassedy: If your Honor please, may I add just one further statement as associate counsel?

Hearing Examiner Ballinger: You may.

Mr. Cassedy: In addition to the objections made by Mr. Flanagan, if these exhibits are admitted in evidence as proof of price discriminations under the Clayton Act, as amended by the Robinson-Patman Act, the respondent will be called upon to meet individually the sep-
504 arate sales represented by all of these composite summaries of transactions. If there is a defense offered it would have to be offered on an individual basis of each and every transaction referred to in this document, or these documents. Therefore, the respondent would be put to a task that would be so insurmountable, or so impossible, that it would be a denial of due process of law to force this respondent to such a situation in making his defense.

The objection is specifically directed to the summaries represented by these proposed exhibits rather than offers of individual instances of purported price discriminations.

Now, furthermore, the exhibits do not purport to show individual price discriminations between different customers or purchasers of goods of like grade and quality. There is no indication by these summaries as to what discriminations were made, the amount of the discrimination, the name of the purchaser on one leg as the purported discrimination or the name of the customer or purchaser on the other leg of the discrimination, and it presents an impossible case so far as this respondent is concerned, to defend.

One further point, if your Honor please; we do not object to these summaries in so far as accuracy is concerned. We realize that the Commission's accountant has truly reflected, or he has endeavored to truly reflect
the figures that he has summarized on these docu-
505 ments, but we do object to the fact that his sum-
maries include only a part of the records examined by him. They tell only a part of the story and not the whole story.

That completes our objection.

Mr. Schrup: If the Examiner please, I think both Mr. Mayer and myself would like to answer both Mr. Cassedy and Mr. Flanagan.

It just occurred to me that the very last objection that Mr. Cassedy stated makes his position rather inconsistent. First, he says that the charts present an insurmountable obstacle, and, secondly, he objects because they present only part of the story. I don't know which leg they are standing on there.

We only have taken the pricing practices of the respondent as the respondent himself has had them in effect. As the accountant has pointed out with relation to the ignition line and as the accountant has pointed out with relation to the fuel pump line, that when a purchaser buys in the ignition line all the items he buys appear on that invoice. The seller does not make a separate invoice for each single item, they are all grouped together.

Now, there is no question that as regards each comparable item they are goods of like grade and quality.

Now, the charts themselves are not presented to show
the existence of competition but merely the price
506 pattern of the respondent in the interstate and intra-
state sales. The respondent conceivably is in inter-

state commerce. The charts merely show the price difference that exist between purchasers of the respondent's products, and we will propose to go to several cities to establish the existence of competition between the customers of the respondent. That will be what the respondent will have to meet.

Hearing Examiner Ballinger: Does the evidence that is already in justify the admission of these documents on the ground of interstate commerce?

Mr. Schrup: There is no question that some of the sales in here cross state lines, if your Honor please, the sales on the charts.

Mr. Flanagan: Counsel, that is merely a statement of yours.

Mr. Mayer: Mr. Examiner, can we have your question again? I did not understand the question.

Hearing Examiner Ballinger: Does the evidence already in justify the admission of these documents, in view of the objection that these transactions have not been shown to be in interstate commerce?

Mr. Mayer: Certainly. There is testimony in this record already by purchasers located outside of the State of New York, and by witnesses, and these charts offered today do have sales within the State of New York 507 from P. & D. Manufacturing Company to customers located within the State, but they are presented on the basis of presenting the pricing pattern of the respondent under the various contracts which are a matter of record in this case, which covers customers both in and outside of the State of New York, but the customers located in the State of New York merely show the pricing pattern as it develops under the various contracts which the respondent offers its various customers.

Mr. Cassedy: Mr. Examiner, may I make one other statement?

Hearing Examiner Ballinger: Yes.

Mr. Cassedy: As to the sales in the State of New York, those sales are wholly intrastate in character. The sales in New York may theoretically be argued as a leg of discrimination, the other leg being sales in Pennsylvania, for instance, to some purchaser located there. That may be true, but the point is, so far as sales are concerned between customers competing with each other in the State of New York, there would be no case in so far as those are concerned. It would not make any difference how much discrimination there was between customers wholly within the State of New York. It would not violate the statute.

508 Exhibits 46-A through 46-E, 47 and 48, admitted in evidence.

514 SELIG SHAPIRO, called as witness on behalf of the Commission, testified as follows:

Direct Examination.

My name is Selig Shapiro, I reside at 524 South Franklin Street, Wilkes Barre, Pennsylvania.

515 I am a partner in the firm of Shapiro Auto Supply of Wilkes Barre, Pennsylvania. I do the purchasing and general managing. My business is the wholesaling of automotive parts. We do not have any branches. We have warehouse facilities in our own building. We generally employ between two and four salesmen.

Our men cover a radius of approximately fifty miles but we confine most of our efforts to the Wilkes Barre general trading area.

516 We compete with any business that would be in the wholesaling of parts, accessories of equipment. The names of several of the companies are Stull Brothers of Kingston; Kitsee Auto Stores of Wilkes Barre; Trancon

Auto Supply of Kingston, K & K of Wilkes Barre and Scranton; Klein Auto of Wilkes Barre. That just about covers the field.

We offer our product for sale to garages, car dealers, gas stations and also some sub-jobbers.

During the year 1950 we purchased approximately $198.00 of products from the P. & D. Manufacturing Company.

517 That was the total amount of the business for 1950 and covered one order that was shipped in two parts.

We had a formal contract with the P. & D. Manufacturing Company covering our 1950 purchases.

518 Commission's Exhibit 50 for identification is a distributors' fuel pump rebate agreement between P. & D. Manufacturing Company and Shapiro Auto Supply. Commission's Exhibit 51 for identification is, in essence, the same agreement, except that it refers to ignition. To the best of my knowledge the word "regardless" appearing opposite the figure 10% in Commission's Exhibit 51 for identification was on the contract when we received the document.

519 Commission's Exhibit 49 for identification admitted in evidence as Commission's Exhibit 49.

520 I made purchases from P. & D. Manufacturing Company in 1956 and the exact amount of the purchases was $198.74 less rebate and cash discount. However, we received a debit memo from P. & D. Manufacturing for discount taken in error in excess of $11.63. The total amount remitted by check was $165.04, the amount of the rebate and the discount being $33.70.

521 In purchasing from P. & D. Manufacturing we were billed at the regular jobber blue price.

Voir Dire Examination.

My signature appears on Commission's Exhibit 50 and 51 for identification.

522 I do not know who wrote the word "regardless" on Commission's Exhibit 51 for identification. It was inserted prior to my receiving the contract.

Commission's Exhibit 50 and 51 for identification admitted in evidence.

Cross Examination.

524 Prior to purchasing from P. & D. we took ignition from Kem Manufacturing Company and small quantities from Wells Ignition, and I also purchased from Crown Ignition in the past. We are still purchasing from Kem Ignition.

525 We went back to Kem. Kem had a volume rebate schedule in effect during the year 1950. The rebate schedule on the complete line which included our handling the line as a warehouse distributor was 15%, I believe.

I received an invoice from P. & D., then computed the discount and sent in a check. As a result of that I received from P. & D. document marked "Respondent's Exhibit 1" for identification.

526 And subsequent to the receipt of the Respondent's Exhibit 1 for identification I sent a check for the difference.

At the time I was purchasing from P. & D. in 1950 I was purchasing other ignition parts from Kem.

527 In the year 1950 the sales of P. & D. ignition parts accounted for less than 1% of total volume.

533 Respondent's Exhibit 1 for identification admitted in evidence.

534 WILLIAM O. NICKEL, called as witness on behalf of the Commission, testified as follows:

Direct Examination.

My name is William O. Nickel. I reside at 27 Amherst Ave., Wilkes Barre, Pennsylvania. I am with Kitsee Auto Stores, 60 North Main Street, Wilkes Barre. I am the manager. I have had that position seventeen years. Generally speaking my duties are interviewing salesmen, handling credits, talks to salesmen, placing orders, general supervision of salesmen, general inside work.

535 Our business is primarily that of automotive parts. We operate branch stores, and do not maintain a warehouse. The general area that we cover is Luzerne County and part of Wyoming and part of Columbia Counties. We employ five salesmen. They travel the area described.

536 One of our biggest competitors is the car dealer. The reason for that is that you will find the Ford, Chevrolet and Plymouth vehicles consist of, I would say, 75% of our market. During the past twelve years the car manufacturers have been supplying these agencies with parts. It seems that a lot of the stock men in the agencies have gotten the opinion that receiving new cars is contingent on supplies that they purchase. I am not talking about ignition, I am talking about the overall picture. It shuts off a big percentage of our market to the car agencies. In the area that we are selling in the companies that are selling comparable parts are any jobbers that handle ignition parts and everyone handles those. It is like a drug store carrying stamps. You can name them all: Klein, K & K, Tranconi Auto Parts, Stull, Rudolph Electric, Ritter Electric, Penn Parts, Shapiro. They are competitors but we don't recognize them as too big a competitor. Kingston Auto Parts—

that covers the majority.

538 We offer our merchandise to gas stations, garages, car dealers, certain industrial, government agencies, and certain depots.

We do not sell to other jobbers.

During the year 1950 we purchased from P. & D. ignition parts, rotors, distributor caps, coils and dimmer switches. An idea of all of our purchases for P. & D. during 1950 are October 12—$273.83, August 31—$343.37, July 11—$273.13, June 5—$105.87, April 13—$202.62, February 15—$287.73. We try to run an order through to justify the schedule of discounts. We figure that it is a saving involved as far as the company is concerned. We made a definite attempt to make one order of a certain size.

539 We made a recount recently and found that there are 507 items on the P. & D. that we attempt to carry. The P. & D. representative or road man checks our inventory for us as an accommodation. When he gets through he has a recap so naturally when you go through 507 items you are bound to come up with an order that exceeds $100.00.

I don't remember signing a formal contract with P. &
D. If we had a contract with P. & D. for the year 1950
it would have existed previous to 1950 and there was
540 no renewal contract. The contract with a lot of companies renew themselves. I don't remember that I ever signed a contract with P. & D.

541 The goods are billed to us on the list price shown on the jobbers blue price sheet. We would take this statement and figure the discount on a cash basis and remit to the P. & D. Manufacturing Company. There was a scale of discounts in effect.

542 Normally the car dealer in our competitive area does not offer P. & D. ignition parts for sale.

Price is not the most important factor when I am selecting lines of merchandise. I would say that popular acceptance is the biggest factor. We make an effort to buy at the lowest price possible.

543 We take advantage of discounts offered to us. We ~~like~~ to take cash discounts for two reasons—it gives us some added profit and in addition to that it keeps us on better terms with the manufacturer because invariably we are working with the manufacturer's capital. During the course of the month we might owe a manufacturer or a combined group of manufacturers as much as $30,000.00 to $35,000.00. We are continually using that credit. If our credit becomes in jeopardy, then we lose credit extension from those companies.

544

Cross Examination.

During the year 1950 the ignition end of our business comprised about three-quarters of one percent. Our main competition is that we cannot sell the car dealer with few exceptions.

547 If another account receives a greater discount on the P. & D. line, than we receive, I would say, it would not hurt us competitively.

548 It wouldn't hurt us because the line doesn't comprise that much volume and our clerks at the counter don't know whether there is an extra discount involved. That is handled by the Accounting Department, and therefore they wouldn't use that a medium of getting extra business for their place.

Price was the secondary consideration on this particular line and if a competitor receives a lower price it wouldn't effect us in any way, shape or form.

Redirect Examination.

I would say that we offer about 150 lines. My ideas of injuries that I have just expressed does not apply to all of the 150 lines in the store.

549 Our general business health depends upon our ability to move all of the lines offered at a reasonable profit. The majority of lines we carry are fair traded. Each of the companies have a policy and they ask us to sell on the suggested policy and we try to adhere to that policy. No matter what the other fellow buys at he is not going to hurt us because we all maintain the same schedule prices. We go to the same thing on fuel pumps, fillers, and spark plugs. Any extra discounts which you would earn goes in through the accounting department. We don't give those discounts away. We figure we earn them by extra efforts. It might be a greater amount of purchases—this means bigger inventory in your stock. When you get a bigger discount when buying on a bigger volume we don't necessarily pocket that extra money ourselves because on that merchandise you don't get a turnover.

551 Where you buy in large quantities and get larger discounts it takes a longer time to move the stock and where you buy in small quantities you have a quick turnover.

Recross Examination.

During the year 1950 we bought only the ignition line from P. & D. We did not buy the fuel pump line.

HAROLD A. STULL, called as a witness on behalf of the Commission, testified as follows:

Direct Examination

552 My name is Harold A. Stull. I reside at R. D. 2, Dallas, Pennsylvania. I am a partner in Stull Brothers, Kingston. I manage the automotive parts department. We do not operate any branch stores, but we maintain a warehouse.

553 I would say that we handle at least 200 different lines and we would have 20 to 30 major lines.

We travel salesmen outside our store and they cover generally an area of 50 miles.

554 We sell a couple of small jobbers, but P. & D. line is not included. In 1950 we purchased ignition parts from P. & D. I don't know the average size of order for the year 1950, but I do know that our total purchases from P. & D. in that year ran a little bit more than $3,200.00.

555 I don't know whether we had a formal contract with P & D. or not. We started doing business with P. & D. back in 1934. I don't know if we had a contract with them at that time. It seems to me that we would. I wasn't able to locate one.

We are invoiced by P. & D. at jobber prices—that is, the blue jobber prices and from that we pay the bill when it comes time the tenth of the month and take a 15% discount. 15% is taken on all purchases of the pre-
556 ceding month. Once in awhile we are charged back, for example on a cabinet. We have jobber and car dealer competition in the resale of automotive parts in our area. The car dealer is the chief competitor. To my knowledge there are no car dealers in the area which offer P. & D. items for sale. Our chief competitor is General Motor, people who sell United Motor Service parts or the Delco-Remy line. The next is Auto Lite ignition for the Chrysler line and the third is the Ford line
557 of the ignition; namely, Holley.

558 We offer our automotive products for sale to fleet owner, garage owner, and the service station operator.

Price is not the most important factor when selecting the line of merchandise, but once you have selected a given line I attempt to buy the line at the most favorable price offered by the manufacturer.

Quality is the important factor.
559 Price is not an inducement. We wouldn't substitute
price for a quality line because if we took a cheap line
we couldn't do much business with it, but if we took a
quality line we can sell more of it.

P. & D. is considered substandard because of the car manufacturer, who considers everything he manufactures for his automobile as the original. They feel that everything that isn't in a Chevrolet box isn't the best quality.

560 We take advantage of the discounts offered to us
by our various suppliers. We take the cash discount
because if we did not there is not much left beyond the
2% cash discount in this business. I worry because of the
car manufacturer invading the parts business. We don't
consider it his business once that the automobile has
561 left the factory. It is the fellow's business who can
get it, but when they use the kind of tactics they use
to keep that business all their own, it is difficult for the
automobile jobber to have much left.

Cross Examination.

We give our customers 2% for prompt payment based upon our selling price to them.

With the P. & D. line we don't get 2%. This 15 per cent we take per month is all of it, so that it will actually be 13 and 2. In 1948 we took on United Motor ignition line and that is in direct competition to the P. & D. line.

562 We have a Chevrolet dealer right next door to us
563 and we may sell him pick-up that he may need of
the United Service line, but not the P. & D. He won't
use P. & D.

Percentage of our gross sales in the automotive line in 1950 as represented by P. & D. products would not be more than 1 to 1½ percent, very low.

We travel five salesmen and one of those is a special salesman who sells paints and body supplies. He has nothing to do with the regular line of replacement parts.

I do not consider the other P. & D. accounts in the trading area as competitors of ours. Until this morning I didn't know that Nickel had the line or that Shapiro had it. We don't consider it a major line—it is just a line.

565 *Redirect Examination.*

566 Anyone that would sell the same line that we sell in our area would be a competitor, but coming back to P. & D. I have never felt that we had any competition in that line because the major business is the car dealer merchandise. United Motor service and the other lines—that is our competition.

As between jobbers there is competition for business.

568 ALLAN G. SMITH, called as a witness in behalf of the Commission, testified as follows:

My name is Allan G. Smith. I reside at 335 Clay Avenue, Scranton, Pennsylvania. I am associated with Sterling Auto Supply, which is located at 1113 Jackson St., Scranton. I am the owner of the company. I do everything in the business. The business is primarily that of automotive parts and supplies.

569 We do not operate branch stores. We operate a separate warehouse building other than our store. We handle about 75 general lines.

570 I have three salesmen and the salesmen travel outside of the confines of the store and cover the general area of Northern New Jersey and a few counties
571 in New York State. We cover an area of at least 70 miles.

We call on the general garage trade, the car dealer and the gas stations.

We have competition in the area and the general class of competition is other jobbers.

During the year 1950 we purchased the ignition line from P. & D.

572 I don't know the average size order with P. & D. in the year 1950. Sometimes it would be over $100, sometimes less. Originally we had a contract with P. & D. but that contract has been out-dated. At the time the contract was signed I was in partnership with another man and since the partnership has been dissolved P. & D. inherited my end of the business.

573 We are billed at the regular jobber blue list price sheet of P. & D. We take a discount according to the P. & D. policy—just what the percentage would be I can't tell you. We deduct the discount from P. & D. billing.

P. & D. salesman call upon me every six weeks or two months. I do not keep track of it, but he comes there once in a while and we then order. Sometimes we do not wait for him to come. I don't know that he has ever traveled the territory with our salesmen. He probably would if we asked him, but we do not require very much missionary work. We would rather not be bothered.

574 Personally I am not a price buyer. I want merchandise. My business has been built on quality merchandise and I never question the price. I don't know that I stress the point of trying to buy at the most favorable price offered by the manufacturer. I like to take advantage of all discounts offered if we can get it.

I do some sub-jobbing with the P. & D. lines. I usually work with those fellows on a cost plus basis. I do not receive any compensation from P. & D. on that type of sale.

575 We figure on cash discounts. I make it a practice of taking 2% discount as it is quite an item at the

end of the year on the volume of business that I do, whether it is P. & D. or anyone else. I don't think I ever lost a 2% cash discount. Some manufacturers operate on one percent, some on two percent and some maybe five.

576 *Cross Examination.*

I give my customers a discount of 2% for prompt payment and that is based on my selling price to them.

My opinion is that we did maybe 1% of our gross sales on P. & D. items in 1950. P. & D. is not a big volume item.

577 JESSE LEVY, called as a witness on behalf of the Commission, testified as follows:

Direct Examination.

My name is Jesse Levy and I reside at 1708 Linden Street, Scranton, Pennsylvania. I am associated with Hi-Grade Auto & Supply Company, which is located at 437 Wyoming Avenue, Scranton. I am purchasing agent of that company and more or less general manager. I contact salesmen as they come into the store. Our business is primarily that of automotive equipment and supplies. We do not operate branch stores.

578 We have warehousing facilities on the premises. If each different manufacturer's item would be considered a line, we would offer over 300 lines.

Our salesmen take in the territory generally of Northeastern Pennsylvania, a radius of approximately 35 to 40 miles.

579 We offer our products for sale to fleets, garages, car dealers, and service stations.

We have competition from all other jobbers in the town or in the area.

During the year 1950 we purchased ignition, points and contacts from P. & D. Manufacturing Company. We did not purchase the fuel pump line.

I would imagine that our average size order placed with P. & D. during 1950 would run a couple of hundred dollars.

I do not know that we had a formal contract with P. & D. covering our 1950 purchases. We had one prior to
that, which I supposed carried over. I don't purchase
580 according to any price. All I do is check on a per-
petual inventory system and I carry a certain stock
level. Personally I don't know whether P. & D. sells me according to the terms of price or not. I do not make an attempt, when purchasing from P. & D., to make a certain size order to get a certain volume. I always receive a straight 10%, which is deducted from the remittance from my company to P. & D. We do not do any subjobbing. P. & D. salesmen call on us three or four times
a year.
581 He hasn't traveled with our salesmen for quite
a while. He would I imagine if he was requested.
When we first took on the line they did some missionary work.

Price is an important factor only when opposed to like or similar lines. Once I have determined upon a particular line, I attempt to buy at the most favorable price offered by the manufacturer. As a general rule I take advantage of the cash discounts offered by various
suppliers.
582 I think it is good business.

We do business on manufacturer's terms as far as applies to discount. Some are 1% 10 days, some are 2% 30 days. Generally it is 2%. Discount is not contingent upon the size of the order. It is a cash discount.

Cross Examination.

We give our customers 2% cash discount for prompt payment of their bills.

583 One of the major factors to be determined in selecting any line is public acceptance. It is the determining factor as one line against the other.

At the outset if I were asked to choose between two lines and they were both comparable and accepted generally as a standard line, price would enter into the situation, but once you have established a line it might be less beneficial to change to a line that would be cheaper, because you already have these things set up and it would disrupt everything just to throw out one and put another one in. In that case price does not enter into it.

584 We can't touch the car dealer as far as selling ignition to him. We sell practically none to car dealers because they have the car manufacturers on their necks and it is shoved down their throats. Prices are set up so that we cannot touch them regardless. The car dealers sources of supply are principally Delco-Remy, Auto-Lite and Holley.

585 SOL GOOSAY, called as a witness on behalf of the Commission, testified as follows:

Direct Examination.

My name is Sol Goosay. I live at 1003 Olive Street, Scranton, Pennsylvania. I am a partner of Penn Auto Parts, which is located at 666 South Washington

586 Avenue, Scranton, Pennsylvania. I am general manager. Our business is primarily that of automotive parts and supplies. We do not operate any branch stores nor do we maintain any warehouse other than the storage space at our own store. We carry approximately 100 lines and employ five outside salesmen, who cover a 45

mile radius from the store. We sell generally to serv-
587 ice stations, garages, fleets, construction, et cetera.

We have competition from automotive dealers, other jobbers, fleets, contractors, et cetera.

During the year 1950 we purchased ignition parts from
P. & D. for resale. There was one order for 300 odd
dollars. It was a single shipment. We had a formal
contract with respondent covering our 1950 purchases.
588 We were to get back 15% on the billing. That is
off the monthly purchases, irrespective of the amount
of the purchases. We have always maintained that volume with them at all times.

588 In purchasing from P. & D. we are billed at the
regular jobber price, the blue list. We do sub-jobbing
and did so on the P. & D. line. We sold the jobber
589 in that instance on the blue sheet price, and received
compensation from P. & D. because of that sale.
It is an additional 5%. In other words, it would be 20%
on that particular transaction. The sub-jobbers or subjobbing accounts operate within our trade area, and resell in the same area.

The P. & D. salesman calls upon us about four times a year. We have some missionary work and the P. & D. salesman does it.

591 Once we have selected a given line we attempt to
buy at the most favorable price offered by the manufacturer. We take advantage of cash discounts offered by various suppliers. We take it for the reason that it is necessary to reduce costs, increase the profits, to meet competition. The normal cash discount is 2%.

Cross Examination.

We also give our customers 2% for prompt payment and that is based upon our selling price to our customers. In 1950 3½% of our gross sales was composed of P. &

D. ignition parts. Correction, that would be for one month as we only bought it for one month.

591 On a yearly basis I would say the percentage would be between 2% and 3%. We do not have any other ignition line. Our biggest competitors in the automotive ignition field are Delco-Remy, Auto-Lite and Holly and they are sold primarily by automotive dealers and service companies.

592 DAVID RUBIN, called as a witness on behalf of the Commission, testified as follows:

Direct Examination.

My name is David Rubin and I live at 1025 North Webster, Scranton, Pennsylvania. I am the owner of Dave's Auto Parts located at 216 Vine Street, Scranton, Pennsylvania. I buy, sell, make recommendations on motor work, and general direction.

593 My business is primarily that of automotive parts, supplies and machine shop service. I do not operate any branch stores nor did I do so in 1950. I do not maintain any warehouse. I have one salesman, who travels mostly in Scranton County or a radius of about 20 miles. We sell generally to garages, dealers, and gas stations, strictly wholesale. I have competition in the resale of automotive products in the area. Competition is K & K, D. G. Nicholas, Alkerson & Weinberg, Philips & Mayer, Fullerton & Strassburger, Scranton Auto Ignition. These jobbers all operate in the same area.

594 I handle approximately 40 automobile lines and in 1950 I purchased ignition, coil and voltage regulator products from P. & D. It is the ignition line. I don't know what the average size order was that was placed with P. & D. for that year. In 1950 I didn't buy too much because I didn't like the way they handled themselves.

One, for instance, was only $19.73, the next one was $48.59, another one was $71.03 and $96.65.

I don't recall a contract, but if I remember correctly I was supposed to make a certain size order and then I would get a certain discount.

595 I think I had a formal contract with P. & D. in 1950. The terms, if I remember, were that I would get 20% discount below the jobber. I paid them on a certain date after deducting 20%. If it was a few days late, they wouldn't allow me the 20%. When I saw how they were handling themselves—that a couple of days made a 20% difference—I didn't like that kind of business and I wouldn't play that way and I wouldn't pay them. They sent me the check back and I wouldn't pay and that dispute lasted six months. I wouldn't pay unless they gave me the 20% and they wouldn't take it unless I paid them in full. Finally I paid them the 20%. They finally accepted the deduction of 20%.

596 I was invoiced or billed at the regular jobber list price subject to discount. I did not do any sub-jobbing business. Once I have determined on a particular line, I attempt to buy at the most favorable price offered by the manufacturer. I attempt to take advantage of cash discounts offered by the various manufacturers. The reason is that 2% means an awful lot when it amounts up by the year.

Cross Examination.

597 For the year 1950 I bought $277.48 from the P. & D. Manufacturing Company. I started with P. & D. in February of 1949 and stayed with them until July 1950, which was at the time of the 20% dispute and then I didn't buy any more. It was approximately a year and a half. The dispute wound up by P. & D. accepting my check with 20% off.

598 After the dispute there were no longer any business dealings between myself and P. & D.

I do not have a copy of the contract with P. & D.

Commission's Exhibit 46-D is in error as it shows that for the year 1950 I did not receive a discount.

599 I know I definitely was buying at a 20% discount and when they wouldn't allow the 20% because I was late I would not pay them.

Mr. Mayer: I am willing to concede that the entry for Dave's Auto Parts showing on Commission's Exhibit 46-D is in error when it shows that no rebate was allowed by P. & D. Manufacturing Company when, as a matter of fact, from the witness's own testimony, 20% was allowed.

600 A small percentage of my total sales for the year 1950 consisted of P. & D. ignition parts.

601 There was only about $450.00 of purchases and that is a very small percentage.

602 I give my purchasers 2% discount on prompt payment of bills.

Delco Remy, Auto-Lite and Holley are the big competition in the replacement ignition field.

608 CHARLES S. ROGERS, recalled as a witness for the Commission, testified as follows:

I am the same Charles Rogers who testified in this matter previously.

609 I couldn't say whether we are selling various members of that particular group, Warehouse Distributors, during 1950. In 1950 or 1951 they called us in and told us that they were members and we were asked to go down there and meet with the group.

610 I wouldn't say that we had a formal contract with the members of that group, or with the buyers individually. We have a contract with everyone we sell. That

is the policy of the Company. After they became members of the group we should have had a contract to meet our competition with the group.

We would receive an order blank and it said "Warehouse Distributors'', and "Ship to Womwell" or ship to this one or that one, and we would in turn ship and bill the Chattanooga office and they would make payment. The order would originate on the order blank
611 form of Warehouse Distributors, and P. & D. shipped and looked to Warehouse Distributors for payment. In other words formerly we shipped to Womwell or whatever account it might be, they sent in an order on their stationery. When the change was made the order came in under the name of the group.

The rebate was to meet competition. It was 20% as a function rebate. They took it off the face of the invoice when they paid.

612 I think the way the 2% was handled was that they first took the 20% and then 2% on the net. I would have to check that.

I don't think that was their monthly statement prepared for each member of Warehouse Distributors who purchased from P. & D. We just sell one account.

613 We sent our statement—that is based on our blue jobber price sheet. Then they deducted 20% from the net price shown on the blue sheet. There is no remittance by the separate members, just one billing.

615 Everyone buys at the same price, those classified as jobbers and those classified as distributors. However, the rebates are different.

Commission's Exhibit 15-D is a monthly report, secondary distribution accounts. We give the jobber the difference between the 10, 15 or 20 for redistribution, when the jobber passes on the lower price that he gets.

617 The Exhibit is for those distributors who distribute to secondary distribution accounts or other jobbers.

The distributors sign up a contract with this jobber that they can give him a precurement plan instead of flat rates and parcel post and things like that, they can place him in a position to buy, maybe not our line, but maybe 15 other lines from one point. They report this sale to us and we send copies to our men, who check and see whether the invoices and the amounts are right. The district managers check the accounts to be sure that the sales listed are actually made by the distributors.

618 The only thing that would be important to us is that the distributor would list the names of those jobbers he is selling, with the invoice numbers that he uses, so that we can justify that compensation he gets for reselling these other accounts.

619 He gets same compensation as a regular distributor. He just passes it on and we have to reimburse him for what he gives out.

We have only one grade of products, which are offered to various customers. All parts numbered AU 18-22 would be identical to any other part numbered AU 18-22. However an AU 18-22-H would mean it would have a heavier contact. It would be the same part all the way through with the exception of a bigger tungsten. All of the parts have tungsten on them. One would be a larger size tungsten, one would be smaller.

620 An 18-22 would be the same as every other 18-22 and every 18-22-H would be the same as every other 18-22-H.

621 P. & D. competes on the primary level against the car manufacturers. That would take in General Motors, Chrysler and Ford.

United Motor Service, the Delco-Remy line, is a part of General Motors. Also the independent manufacturers of ignition.

These competitors are attempting to sell the same as P. & D. who sell the regular automotive jobbing trade.

We have to take into consideration the prices offered by competitors and we have to place our jobbers in position to compete. Prices are aimed at keeping jobbers competitive as well as ourselves.

622 Our jobbers as well as jobbers of our competitors attempt to resell the merchandise to garages, independent repairmen, filling stations and that class of trade.

In any given trade area our jobbers receive competition from car manufacturers' dealers.

623 In addition our jobbers must also meet the competition of jobbers of competitors other than car dealer competition.

625 I couldn't say if there is competition between our own jobbers. I will give you an actual case. There were two companies in Boston, one Hunt-Marquardt and the other Collins Company. They fought for years and said they were competing against each other. Then when Hunt-Marquardt bought out Collins they actually found that there was less than 4% of the accounts in Collins' books that were on the books of Hunt-Marquardt, and vice versa. I would not be in a position to say how much they are competing.

626 In most cases the regular automotive jobber that carries ignition competitive to P. & D. is attempting to sell the same automotive trade.

627 I would imagine on each particular line offered by the car dealer that he is competing with a segment of our particular ignition line.

I couldn't say that our jobbers in any given trade area are attempting to sell the same class of trade. We have jobbers in certain areas that got after the industrial field. Then you have the agricultural market and the industrial market.

628 Assuming that we have two or more jobbers operating in the same trade area and there is a potential retail buyer, it is quite obvious that they have to get out and get business, but, as I have said, there as so many accounts each jobber has, like we go to the butcher, I go to a certain butcher, and someone else goes to another certain butcher, we don't all go to the same place, and the same is true with garages, we don't all go to the same garage. We don't like the salesman, perhaps, or don't like the place. The automotive retail business is much the same, they might not like someone supplying a competitive line, but would come to us. They are all looking for a piece of business, but they can't have it all. That is why there are so many jobbers around.

631 Mr. Mayer: Mr. Examiner, that concludes the case of counsel in support of the complaint at this time.

658 Mr. Cassedy: I would like to offer the testimony of Mr. Rogers, the general manager of the respondent, as a witness in support of the motion entitled "Motion to Require Commission to Elect." Mr. Rogers would would testify to the following if permitted to do so: that the respondent has been placed in a position where it is a practical and financial impossibility to present the defenses that the respondent company has to the charges made against it; that it will require many man-hours and thousands and thousands of dollars of expense to prove here the existence of competition or the lack of competition between the competing purchasers or non-competing purchasers who have been named by the Commission's exhibits; that the various accounts introduced in these exhibits number some 235, they are located in fourteen states, they involve many thousands of transactions throughout those states, and the elements of economic

factors that may exist between those who may be in competition with each other, the financial status of these various customers, the question of competitive injury or the lack of competitive injury that may or may not exist between them would have to be developed, the study of the records alone in the respondent's office would take several months' time in order to prepare this case.

To illustrate that it might be pointed out that the Commission's own accountants spent several months in even preparing the records that were offered in this case, that is, several months in respondent's office, let alone the time that they spent here at the Commission in getting this case ready.

And if Mr. Rogers were permitted to do so, he would testify to those facts which would show that the Commission has present this respondent with an insurmountable situation. It is impossible to meet it.

663 Hearing Examiner Kolb: With reference to the first motion made by the attorney for the respondent to dismiss the complaint as to the primary line of competitive injury, it is the opinion of the Hearing Examiner that no case has been made out on the primary line. Under these circumstances I will require no testimony on the part of the respondent to meet any charge of primary line injury.

As to the second motion to dismiss that is more or less a duplication of the motion previously made before the Hearing Examiner.

664 It goes to the question as to whether or not a prima facie case has been made on this proceeding. The motion will be denied.

The motion to require the Commission to elect is denied as it is the opinion of the Hearing Examiner that an election has been made so far as the testimony is concerned to two areas, Boston and Scranton, and that sets the area which the respondent would have to meet.

665 Mr. Cassedy: Now comes P. & D. Manufacturing Company by Halfpenny, Hahn and Cassedy, its attorneys, at the close of the Commission's case and in the light of the ruling you have just made with respect to the limitation of the Commission's case to the instances referred to at Scranton and at Boston, and moves the Examiner that all evidence other than that pertaining to those two places and the witnesses introduced at those two places be stricken from the record.

Hearing Examiner Kolb: The motion to strike will be denied.

Mr. Cassedy: Now if it please the Examiner, I wish to make the statement that in the light of the rulings made on these various motions that it is impossible for the respondent to proceed and reserving to itself the questions raised, we rest.

Hearing Examiner Kolb: Upon having rested, the proceedings will be closed for the taking of testimony.

Mr. Cassedy: If Your Honor please, may I now renew the motions that have been made to dismiss and to strike at the close of the case on both sides? I do renew those motions, and present them now.

Hearing Examiner Kolb: When you are renewing your motions?

Mr. Cassedy: Both motions to dismiss—the first motion was sustained—the second motion was to dismiss which was denied—we renew that motion.

Hearing Examiner Kolb: The renewal of the motion would, I think, be taken up in your proposed findings and will come up before the Hearing Examiner on making the initial decision in this proceeding and would not be a proper motion to make at this time since that is what the

Hearing Examiner has to decide, whether or not there is a violation. So, so far as the motions being made at this time, they will be denied with the understanding, of course, that these matters will be considered in making the initial decision and I assume will be raised by counsel in the proposed findings.

Mr. Cassedy: Yes. Before we finish, I would like to renew, and do renew the motion to strike, which I just made.

Hearing Examiner Kolb: That motion will be denied.

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[illegible]

GENUINE P. & D.

STARTING, LIGHTING, IGNITION PARTS

CATALOG No. 49

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P & D PRODUCTS SOLD TO RECOGNIZED JOBBERS ONLY

218

Note

Pages 158-181 are on Cards 4, 5, and 6.

Page 182 is blank.

567

COMMISSION'S EXHIBIT No. 52.

UNITED STATES OF AMERICA

* * (Caption—Docket No. 5913) * *

EXAMINER'S RULING AND ORDER ON RESPONDENT'S MOTION TO DISMISS THE COMPLAINT.

Counsel for the complaint having rested the Commission's case in chief, counsel for respondent moved to dismiss the complaint on the stated ground that the record evidence is insufficient to establish a prima facie case of violation by respondent of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13). Counsel for the complaint answered resisting the motion. Counsel filed briefs in support of their respective positions, but as neither the motion, answer or briefs were filed in the Secretary's office as required by the Rules of Practice the motion and brief in support thereof will be marked Respondent's Exhibit No. 2 and the answer of counsel for the complaint and brief in support thereof will be marked Commission's Exhibit No. 52 and filed and included in the exhibits in this proceeding for future reference.

The Examiner having examined with care the papers referred to, for the following reasons reaches the conclusion hereinafter stated.

The statute respondent is charged with having violated is as follows:

568 "Sec. 2 (a) That is shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities

> of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

Respondent's motion raises solely the question of the sufficiency of the evidence to establish a prima facie showing of violation of the statute by respondent. "Prima facie evidence is to be contrasted with conclusive evidence. It means that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed." Jones Commentaries on Evidence, Vol. 1, Sec. 19.

An examination of the evidence in the light of the above controlling rule and the statute discloses:

Interstate Commerce: All sales made by respondent, except sales made in New York State, were in interstate commerce. (See Par. 2, Resp. Ans. to Comp.)

Competition: Competition in the primary line is admitted (Par. 3, Resp. Ans. to Comp.). A sufficient prima facie showing of competition in the secondary line appears. The evidence sufficiently establishes that respondent's jobber customers were in competition with one another and with other jobbers purchasing like merchandise from other suppliers, in the resale thereof, in the same sale areas.

Like Grade and Quality: Respondent's merchandise consists of ignition parts, fuel pumps, carburetor kits and parts thereof, all listed at uniform prices in respondent's catalogs distributed to the trade, thus importing that each item listed therein was standardized and of like grade and quality.

569 Price Discrimination: Respondent submitted to the Commission a statement of its sales during the year 1950 aggregating $1,685,059.00 and showing the price brackets of its customers. The first 5 columns of the following table submitted to the Commission by respondent depicts the number of jobbers in each price bracket purchasing ignition parts and carburetor kits and parts thereof at discounts and rebates allowed from respondent's list sale price, and the sixth column depicts the rebate allowed on fuel pumps:

		Rebate				Rebate
	2%	#1&#2	10%	15%	20%	#3
No. of Jobbers	60	258	92	86	186	56
Sales	8364.	299417.	134619.	168570.	1054638.	19451.

It affirmatively appears from the record that in addition to the 10 percent and 15 percent rebates shown in the above tabulation a part of the jobbers in those brackets received an additional 2 percent discount, 30 days; that all of those in the 20 percent rebate bracket received an additional 2 percent discount, 30 days; and that discriminatory discounts and rebates were allowed purchasers of fuel pumps ranging from 2.40 percent to 28.49 percent. It further appears from the record that respondent knowingly granted said discriminatory discounts and rebates to jobbers purchasing its merchandise for resale in the same resale areas.

Identity of Merchandise: In the marketing of its products, respondent issues and distributes catalogues and price sheets to its jobber customers describing each of the many parts in each of its three lines of merchandise—ignition, carburetors and fuel pumps—and the price of each part. The amount of the discriminatory rebates allowed is determined by the amount of monthly purchases of any one or more of the items listed. When respondent sells replacement parts classified to the three lines above described, to its jobbers, who resell in competition with each other in their respective trade areas, the functional similarity of the individual items in each class is no longer of consequence because from a comparative standpoint they are all of like grade and quality within the meaning of the statute.

570 Injury to Competition: A prima facie showing that the effect of the price discriminations hereinbefore shown may be substantially to lessen or injure, destroy or prevent competition at the secondary or resale line or level sufficiently appears from the record evidence. The evidence establishes that the jobber margin of profit is very narrow, which necessitates their taking advantage of the 2 percent cash discount, 30 days. Such being the case, it can reasonably be inferred that injury to competition has or may result from sales by respondent to certain of its jobbers at higher prices, who resell in the same sale areas with other jobbers purchasing from respondent at greatly reduced prices. In F.T.C. v. Morton Salt Co., 334 U.S. 37, at 46 and 50, the Court said:

> "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay.
>
> * * * * * *
>
> "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufac-

> turers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence."

See also decision in National Wheels and Parts Mfg. Co., Inc., *v.* F.T.C., Docket No. 5771.

It Is Ordered that respondent's motion to dismiss the complaint be, and it is hereby, overruled.

/s/ Webster Ballinger,
Webster Ballinger,
Hearing Examiner.

March 30, 1954.

588

RESPONDENT'S EXHIBIT NO. 2

UNITED STATES OF AMERICA

* * (Caption—Docket No. 5913) * *

MOTION TO DISMISS

Now comes P. & D. Manufacturing Co., Inc., by Halfpenny, Hahn & Cassedy, its attorneys at the close of the Commission's case and respectfully moves that an order be entered dismissing the complaint.

P. & D. Manufacturing Co., Inc.
By /s/ Halfpenny, Hahn and Cassedy
Its Attorneys